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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 295.

LEGH R. POWELL, JR. and HENRY W. ANDERSON, as Receivers of the Properties and Assets of SEABOARD AIR LINE RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the District Court of the United States
For the Southern District of Georgia.

BRIEF FOR APPELLANTS.

W. R. C. COCKE,
CHAS. T. ABELES,
Counsel for Appellants.

Norfolk, Virginia,
December 1, 1936.

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Appeal from the District Court of the United States For the Southern District of Georgia.

BRIEF FOR APPELLANTS.

I.

OPINIONS BELOW.

The majority and dissenting opinions of the three-judge statutory court (*Powell, et al. v. United States*) are reported in 12 Federal Supplement 938, and have been included in the printed record at pages 327 to 342.

The report and order of the Interstate Commerce Commission challenged in this suit are published in [illegible] and have been reproduced at pages 9 to 20 of the printed record.

II

STATEMENT OF THE CASE

This suit was brought to enjoin an order of the Interstate Commerce Commission requiring to be cancelled from its files a tariff filed by appellants extending the switching limits of Fort Benning Junction, Georgia, to include designated locations within Fort Benning, Georgia. The litigation is the culmination of a series of antecedent controversies surrounding transportation service at Fort Benning. A brief history of the events leading to the issuance of the order here assailed provides a factual background against which the scope and significance of the issues may perhaps more clearly appear.

Fort Benning Junction is a station served by the Seaboard Air Line Railway and the Central of Georgia Railway, both of which are in receivership, approximately four miles southeast of Columbus, Georgia. Adjacent thereto, at a distance of approximately six miles, is situated Fort Benning, an infantry and light training camp of the United States Army located within an extensive military reservation. In 1918 a track extending from connections with the railroad lines at the junction into the reservation, was constructed by the Federal Government, and for several years thereafter this track was operated by

the military authorities. In June, 1921, the Government licensed the Central to operate into the reservation and this arrangement remained in effect until 1922 (R. 110).

In January of that year the military authorities became dissatisfied with the service rendered and the rates charged by the Central. The nature and merits of the complaints which were registered are not material here. However, after considerable negotiation and effort to reach a satisfactory understanding the military authorities revoked the license of the Central and entered into arrangements with Page & Harris who were then successfully operating a similar track at Fort Bragg, North Carolina, another military post, whereby Page & Harris were to succeed the Central as operators of the track leading into Fort Benning (R. 235). The record shows conclusively that the Seaboard took no part in these disputes and was in no sense responsible, either by inducement or suggestion, for the change in the transportation arrangements which followed (R. 115, 117).

During the Central's tenure of operation it had enjoyed a virtual monopoly of the automobile traffic moving into and out of the military reservation. The Seaboard's participation in this traffic had so diminished (R. 249) that when in 1927 the Central discontinued operations, removed the connection of the Seaboard's main line with the Fort Benning track and ceased the operations by the Seaboard (R. 266, 273). Possibly the Central foresaw in the retraction of the license and the substitution of Page & Harris in its place a threat to a continuance of its monopoly. In any event it subsequently pursued a course of action which

whether so intended or not, has harassed the operations of Page & Harris and the transportation services rendered by them to the Federal Government at Fort Benning with an almost continuous series of controversies. The disputes, involving as they do only the traffic relations between the Central and Page & Harris, are of no moment to the issues in this case except as evidence of the growing friction between the two parties which, in turn, affords a possible explanation of the persistently obstructive tactics of the Central towards Page & Harris' operation. The attitude of the Central, however, was directly responsible for the major controversies in which the Fort Benning transportation situation was embroiled for months preceding this litigation.

In ousting the Central from Fort Benning one of the primary purposes of the Government was to effect necessary economies in army transportation expenses (R. 235). With this in view the arrangements originally made for compensating Page & Harris for their services were understood to be temporary only (R. 191). It was contemplated that as soon as practicable Page & Harris would secure from the Commission authority under Section 1(18) of the Interstate Commerce Act to operate the track as a common carrier, in which status they could lawfully enter into agreements with the trunk line connections at Fort Benning Junction for divisions of the line haul rates for the services performed by them between the junction and the reservation, the revenue from this source relieving the Government of the burdensome expenditures theretofore incident to the operation of the Fort

Benning track (R. 189, 190). Accordingly, in November, 1932, the Fort Benning Railroad Company, organized for the purpose by Page & Harris and others in no way associated with the Seaboard, filed an application with the Commission under Section 1(18) for a certificate of public convenience and necessity authorizing the acquisition of the Fort Benning track and its operation in common carrier service. In this proceeding the Central intervened and opposed the granting of the application, notwithstanding which on June 18, 1933, Division 4 of the Commission issued the certificate. *Fort Benning Railroad Company Acquisition*, 193 I. C. C. 223. Shortly thereafter, however, the Commission granted a petition by the Central for reargument and reconsideration of the case, and on the following October 4th the full Commission, with four members dissenting, reversed its previous finding and order and denied the certificate. *Fort Benning Railroad Company Acquisition*, 193 I. C. C. 517. The entire record of these proceedings before the Commission which, for brevity, will be referred to as Finance Docket 9709, has been made a part of the record on appeal (R. 182 to 325).

The following excerpt from the second report issued on reconsideration of that case discloses the controlling reason assigned by the Commission for its conclusion that the certificate should be denied (193 I. C. C. 518):

> "Estimated common-carrier earnings [by the Fort Benning Railroad] of $43,000 a year are the equivalent of an average of about $15 a car for the short movement between the reservation and the junction. This revenue

would accrue from divisions of joint through rates, and, therefore, would operate as a reduction, *pro tanto*, of the Central's, or the Seaboard's revenue for the line haul.

"Since there is no community of interest between the contractors and the War Department, the instant case differs in that respect, and perhaps others, from those cases in which it has been proposed to intrude, between industries and line haul carriers, operation by separate organizations, controlled by or affiliated with the industries, of short lines to act as feeders to the trunk lines. But this fact does not differentiate the case in principle.

"We have heretofore said that independent operation of numerous short lines is not conducive to economies in transportation, that wherever possible needed transportation facilities should be furnished by existing carriers, and that this is especially true where the line proposed to be operated in interstate commerce will serve merely as a branch or feeder for an existing carrier. *Operation of Lines by C. R. & E. Ry. Co.*, 94 I. C. C. 389. See also *Tittabawassee R. Co. Proposed Construction*, 189 I. C. C. 363."

The Commission's refusal to approve the plan for effecting substantial economies to the Government in the cost of transportation service at Fort Benning created a problem of no little difficulty. Under the tentative arrangements between the military authorities and Page & Harris the latter were receiving $5.00 per car for the movement between Fort Benning Junction and the reservation, exclusive of switching within the reservation itself. This amount was in-

sufficient to permit the continuance of the arrangement then in effect (R. 138). The Government, on the other hand, under compelling pressure to reduce its transportation costs, would not pay more. Whether, and if so how, this apparent impasse could have been otherwise averted is conjectural, but at this juncture the Seaboard met the situation by publishing with the Interstate Commerce Commission, effective December 4, 1933, the tariff here involved, known as I. C. C. No. A-6826, Sixth Revised Page 139, extending the switching limits at Fort Benning Junction to include a designated receiving and delivery track within the reservation. The effect of the tariff was to afford to shippers to and from Fort Benning the rates theretofore applicable only to and from Fort Benning Junction, and thus to provide satisfactory and efficient transportation service at Fort Benning without cost to the Government other than for the intra-reservation switching beyond the designated delivery track.

In placing in operation the service undertaken by the tariff appellants did not perform the movement between Fort Benning Junction and the military post with their own crews and equipment, but instead entered into an arrangement, informal at first but later embodied in a written contract (R. 21), by which appellants employed Page & Harris to do so as their agents, paying for this service a stipulated amount per loaded car. This plan was adopted for two reasons. First, Page & Harris, with a flexible and experienced organization well adapted to the special type of service required at Fort Benning, had demonstrated their ability to perform more satisfactorily than the trunk lines, and the military

authorities therefore desired them to continue the actual operations (R. 134). Second, a thorough study by appellants of conditions surrounding the operation into Fort Benning convinced them that it would cost them more to perform the service themselves than to employ Page & Harris to do so (R. 123 to 128). The agency arrangement was therefore obviously in the interest of economy.

In thus enlarging their transportation service there was no purpose on the part of appellants either to monopolize the Fort Benning traffic or to secure more than their fair share of the movement. Any such effort, as appellants knew, would have been opposed by the military authorities whose consistent desire was to avail of the facilities of both the Seaboard and the Central. Of this attitude there is cogent evidence in the endorsement of the Assistant Secretary of War upon the contract between appellants and Page & Harris, in which his approval of the agreement was made

> "subject to the condition that Page & Harris, as Government contract operators of the Government-owned Fort Benning Railway facilities, shall ever hold themselves out as ready and willing to contract, on similar terms, with the Central of Georgia Railway and/or any other common carrier railroad." (R. 25, 26).

Page & Harris have always been prepared to comply literally with this condition (R. 97), and the Central has therefore been at liberty to place itself in a position of complete parity with appellants in respect of Fort Benning traffic. In its refusal to avail itself of this privilege there is strong implication that, under-

lying its persistent opposition to any change in transportation arrangements at Fort Benning, is the firm determination either to compel the Government to permit the Central to resume operation of the reservation track, thus restoring its former monopoly, or, if this is impossible, in any event to impose upon the Government the cost of operation from which appellants' tariff relieves it. We have pointed out above that, as between operation of the spur by either the Central, or the Seaboard, or both, and operation by Page & Harris, the latter is the logical and economical plan.

The proceeding before the Commission upon which the order herein sought to be enjoined was entered was initiated by a complaint filed by the Central of Georgia on May 1, 1934, against appellants and Page & Harris (R. 26), alleging that the tariff and the services rendered thereunder were unlawful, and asking the Commission to require the cancellation of the tariff and order the appellants, among others, to desist and refrain from asserted violations of law growing out of its use. On its face, the document, while incorporating a conventional prayer for generel relief, was primarily a charge that the tariff, and the operation thereunder, constituted a violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and sought from the Commission an order requiring the Seaboard to cease and desist from such operation and violation. Proceeding upon the understanding that this was the gravamen of the complaint, appellants filed with the Commission a motion to dismiss (R. 85), asserting that the Commission was without jurisdiction to entertain the complaint

and had no power to grant the relief prayed for. This motion was renewed at the hearing and has been persistently urged upon the Commission and the lower court throughout the entire proceeding.

After due hearing and argument the Commission, under date of February 5, 1935, issued the report and order herein sought to be enjoined. While it found that, in operating the Fort Benning track without a certificate of public convenience and necessity, appellants were violating paragraph (18) of Section 1 of the Interstate Commerce Act, *it disclaimed any reliance upon that fact as ground for its ruling.* The theory upon which the order purported to proceed is stated as follows:

> "Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1(18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier." (R. 16).

Ostensibly predicating its finding of unlawfulness solely upon this theory, the order required the tariff to be stricken from the Commission's files.

As will be later fully pointed out in the argument, the only suggestion in the report or order of a statutory proscription with which the tariff is supposed to conflict is to be found in the closing paragraph of the report where there is a general reference to Section 6 of the Interstate Commerce Act. There is, however, no specification of what provisions of this section the Commission deems to have been violated.

Immediately upon receipt of the report and order appellants filed with the Commission a petition for reargument and reconsideration (R. 37), urging that the case before the Commission had from its inception proceeded upon the theory that the Central was seeking relief for an alleged violation of paragraph (3), of Section 1 of the Interstate Commerce Act, that this ground had been assigned by the Examiner as a basis for his proposed report, and that the sole theory upon which the Commission's final report and order proceeded, namely, that the tariff was unlawful because it publishes rates to and from a station not on appellants' line and which cannot be reached by them or any other common carrier, had been treated as a subordinate question throughout and had therefore received inadequate consideration. By order dated March 4, 1935, served upon appellants on the following March 14th, the Commission, without further report, denied the petition for reargument and reconsideration (R. 39).

Thereupon on March 21st appellants filed their bill of complaint in the United States District Court for the Southern District of Georgia (the required venue), asserting that the tariff in question was lawful, that the Commission's order and the report incorporated therein were based on erroneous principles of law and exceeded the lawful powers of the Commission, and praying, among other things, for a decree perpetually enjoining the enforcement, operation and execution of the order and that it be set aside and annulled. Pursuant to the requirements of the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A. Title 28, Section

47) a three-judge court was convened and thereafter all proceedings below were had before, and the decree herein appealed from was made in its entirety by, the court of three judges so constituted.

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, (U. S. C. A., Title 28, Section 45a), the Interstate Commerce Commission and H. D. Pollard, as receiver of the Central of Georgia Railway Company, intervened as defendants (R. 44, 48).* As part of his answer, (R. 49) Pollard filed a counterclaim (R. 64), praying that appellants and their agents be enjoined from performing service to and from the tracks within Fort Benning and from using the tariff without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as provided by paragraph (18) of Section 1 of the Interstate Commerce Act, Part I. Appellants thereupon filed a motion to strike the counterclaim (R. 72) on grounds discussed in later pages of this brief.

By final decree, Judge Sibley dissenting (R. 327-344), the court below declared the order of the Commission lawful and valid and denied appellants' prayer that its enforcement, operation and execution be permanently enjoined. The decree further denied and overruled appellants' motion to strike the counterclaim of Pollard, allowed the counterclaim, and granted the injunctive relief therein sought. From the decree thus rendered this appeal is taken pursuant to the provisions of Section 238 of the Judicial Code as

*Certain shippers affected by the Commission's order also intervened in support of the bill of complaint but, an order of severance having been entered (R. 350), are not parties to the appeal.

amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 938, (U. S. C. A., Title 28, Section 345) and the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A., Title 28, Section 47a).

The appeal is from the decree in its entirety although appellants are of the opinion that the part of the decree granting the injunctive relief sought by the counterclaim of intervening defendant Pollard cannot be reviewed on direct appeal, and, in a Supplementary Statement as to Jurisdiction, have so advised the court. Nevertheless, to safeguard against a possible forfeiture of their right to a review of this aspect of the case, they have deemed it essential to submit the decree of the statutory court with respect to the counterclaim as a part of this appeal and as to that aspect of the decree concurrently to take an appeal to the Circuit Court of Appeals for the Fifth Circuit, which will be prosecuted only if this court affirms the decision of the court below denying appellants' motion to strike the counterclaim and finds that the statutory court's ruling on the counterclaim is not cognizable by this court on direct appeal.

III.

THE QUESTIONS PRESENTED.

The basic questions presented by this appeal are:

(1) Should the order of the Interstate Commerce Commission dated February 5, 1935, cited above, requiring the appellants' tariff, known as I. C. C. No. A-6826, Sixth Revised Page 139, to be stricken from

the Commission's files, have been declared null and void and perpetually enjoined as without warrant in law?

(2) Should the court below, for the reasons hereinafter set forth in the assigned errors intended to be urged, have granted the motion of appellants, plaintiffs below, to strike from the answer of intervening defendant H. D. Pollard, receiver, the counterclaim seeking injunctive relief restraining appellants from operating the track between Fort Benning Junction and Fort Benning?

(3) Should the court below, having denied appellants' motion to strike, have granted the relief prayed in Pollard's counterclaim and perpetually enjoined the operation by appellants of the above described track without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity pursuant to paragraph (18) of Section 1 of the Interstate Commerce Act, or should the prayer of the counterclaim have been denied because the operation of said track does not constitute the operation of a line of railroad within the meaning of said section and paragraph but is a switching movement within the purview of paragraph (22) of said Section 1 for which such a certificate is not required by law?

IV.

ASSIGNED ERRORS INTENDED TO BE URGED.

The errors which appellants intend to urge are as follows:

1. The statutory court erred in failing to find

and decree that the order of the Commission is wholly null and void and should be perpetually enjoined for the following reasons:

(a) The tariff of the appellants which the order of the Commission requires to be stricken from the Commission's files is not unlawful for the reasons assigned by the Commission, nor is there any other lawful ground which would sustain a finding by the Commission that the tariff is in violation of Section 6 of the Interstate Commerce Act or of any other provision of law.

(b) The order condemns the appellants' tariff as a violation of Section 6 of the Interstate Commerce Act (the text of which is set out in Appendix A) without designating the provisions of that section with which it is deemed to conflict or otherwise apprising the appellants of the specific violation with which they are charged. The order therefore lacks the certainty and precision which are requisite to sustain an order of the Commission.

(c) Although the order of the Commission purports to be based upon a violation by appellants of Section 6 of the Interstate Commerce Act, the real purpose and effect of the order as clearly disclosed by the report of the Commission and by the record as a whole, are to restrain a supposed violation of paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act, the provisions of which are set forth in Appendix B. The injunctive remedy for a violation of paragraph (18) of Section 1 provided by paragraph (20) of this section is plenary and exclusive, and in attempting to enforce this paragraph indirectly by

striking appellants' tariff from its files instead of by a suit to enjoin appellants, the Commission has exceeded its power and contravened the procedural requirements of law.

(d) The Commission is without power under the Interstate Commerce Act or any other law to strike from its files a tariff theretofore filed with it and conforming in all respects to legal and administrative requirements.

2. The statutory court further erred in the following respects:

(a) In ruling that the Commission could lawfully require the tariff of the appellants to be stricken from the Commission's files to prevent a supposed violation by appellants of paragraph (18) of Section 1 of the Interstate Commerce Act.

(b) In ruling that under the Emergency Railroad Transportation Act, 1933, the Commission could lawfully require the tariff to be stricken from the Commission's files because it unduly impairs the line-haul revenue of the appellants, although the procedure requisite to the exercise of the Commission's jurisdiction under that Act had not been followed, the Commission made no finding of impairment of revenue, and there was no evidence whatsoever before the Commission or the statutory court which would support such a finding if made.

(c) In denying appellants' motion to strike the counterclaim of Intervenor H. D. Pollard, receiver, filed upon the following grounds:

(1) that said counterclaim is an attempt by an intervening defendant to assert an independent cause of action neither related nor germane to the issues raised by appellants' bill of complaint, and is not therefore a counterclaim properly pleadable within the permissible limits of Federal Equity Rule 30;

(2) that because it sought affirmative relief which, if granted, would directly affect and interfere with the possession, operation and control of the properties of which appellants are receivers, said counterclaim and the relief therein sought were matters within the exclusive jurisdiction of the courts appointing appellants receivers, and were accordingly beyond the jurisdiction of the statutory court before which this cause was tried;

(3) that the statutory court had no power or jurisdiction to entertain the counterclaim, and the filing of the bill of complaint did nor confer any such power or jurisdiction upon the court;

(4) that having been convened pursuant to the provisions of the Act of October 22, 1913, 38 Stat. 220 (U. S. C. A., Title 28, Sec. 47), the jurisdiction of the statutory court was limited to the determination of the legality of the order of the Commission sought to be enjoined by the bill of complaint in this cause, and did not extend to the consideration and adjudication of the issues raised by said counterclaim which were cognizable only by a district court consisting of a single judge and exercising the ordinary jurisdiction of a United States District Court.

(d) In that the statutory court of three judges assumed power to grant the relief prayed in said

counterclaim, as evidenced by the signatures of a majority of said statutory court to the decree granting such relief, whereas said counterclaim was cognizable only by a district court consisting of a single judge, and was therefore beyond the jurisdiction of said court of three judges.

(e) In failing to adjudge and decree that the track from Fort Benning Junction, Georgia, to Fort Benning, Georgia, is a spur, industrial or switching track within the meaning of paragraph (22) of Section 1 of the Interstate Commerce Act, the operation of which is not a line-haul service and therefore does not require a certificate of public convenience and necessity from the Interstate Commerce Commission.

(f) In allowing the counterclaim and enjoining and restraining appellants from operating the track between Fort Benning Junction and Fort Benning or using the appellants' switching tariff involved in this cause without appellants' having first obtained from the Interstate Commerce Commission a certificate of public convenience and necessity under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act.

V.

ARGUMENT.

A.

Summary of argument.

1. The order of the Interstate Commerce Commission dated February 5, 1935, requiring appellants' tariff, I. C. C. No. A-6826, Sixth Revised Page 139, to be stricken from the Commission's files should have been declared null and void and its enforcement and operation perpetually enjoined as without warrant in law for the following reasons:

(a) The Commission's report condemns the tariff as a violation of Section 6 of the Interstate Commerce Act. The theory upon which this conclusion is reached is stated variously in the report as:

> (1) "A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise."
>
> (2) "Our finding of unlawfulness of the tariff * * * is * * * predicated on the fact that it [appellants] has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier."

These propositions find no support either in Section 6 of the Interstate Commerce Act or in any other provision of law, and are directly in conflict with long established railroad practices which have been accepted and approved by the Commission and the courts.

(b) In declaring the tariff to be unlawful as in violation of Section 6 without designating the provisions of that Section with which it is deemed to conflict or otherwise apprising appellants of the specific violation of law with which they are charged the order lacks the certainty and precision which are requisite to the validity of an order of the Commission.

(c) The Court, looking through form to substance, will recognize that the real purpose and effect of the order, as clearly disclosed by the report of the Commission and by the record as a whole, are to restrain an operation by appellants which in the Commission's opinion violates paragraph (18) of Section 1. For such violation the injunctive remedy provided by paragraph (20) of Section 1 is plenary and exclusive, and in attempting to enforce this paragraph indirectly by condemning appellants' tariff the Commission has exceeded its powers and contravened the procedural requirements of law. The express disclaimer in the report that the Commission is relying upon a supposed violation of paragraph (18) of Section 1 of the Interstate Commerce Act will not preclude the Court from testing the order on the basis of the power actually exerted.

(d) The tariff was duly filed with the Commission in conformity with legal requirements and the administrative regulations of the Commission. Once so filed, there is nothing in the Interstate Commerce Act or elsewhere which permits the Commission to strike it from its files. Under Section 6 of the Act the Commission is authorized to reject the tariff for only one cause, namely, that it does not provide and give lawful notice of its effective date. The tariff

here in question is not defective in this respect and cannot therefore be stricken.

2. The decision of the statutory court expressly affirms the power of the Commission to enter the order requiring appellants' tariff to be stricken from the Commission's files on the theory that it could do so for the purpose of restraining a violation of paragraph (18) of Section 1 of the Interstate Commerce Act. This ruling is in direct conflict with the uniform decisions of this Court holding that any proceeding to enforce the violation of paragraph (18) of Section 1 must be in conformity with paragraph (20), the remedy there provided being plenary and exclusive.

3. A further reason advanced by the statutory court for sustaining the order of the Commission is "that the tariff unduly impairs the [appellants'] line-haul revenue," citing as authority for this ruling the Emergency Railroad Transportation Act, 48 Stat. 212, Section 4, Title 49, U. S. C. A., Section 254. Before the Commission may function under the provisions of this Act an order of the Coordinator of which a petition for review has been submitted to the Commission is prescribed. These procedural prerequisites have not been adopted in the instant case, and the jurisdictional basis for an order by the Commission is therefore lacking. Moreover, even if jurisdiction were present the order cannot be sustained as a proper exercise of the Commission's power to prevent undue impairment of appellants' revenue, because the Commission has made no finding of such impairment and the record before the Commission and the statutory court is devoid of evidence which would sustain such a finding if made.

4. Appellants' motion to strike the counterclaim of intervening defendant Pollard should have been sustained for the following reasons:

(a) The issues raised by the counterclaim are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30. Although the equity rule is broad in its language, it cannot be properly interpreted to permit a defendant to set up in a counterclaim matters constituting a cause of action wholly foreign to the subject of the bill of complaint. Here the sole question submitted to the statutory court by the bill of complaint is the validity of the Commission's order. The counterclaim, on the other hand, injects into the proceeding a controversy which need not be passed upon by the court in its adjudication of the issues presented by the bill of complaint, and therefore has no relation to the main suit. As such it does not fall within the permissible limits of Equity Rule 30.

Moreover, the counterclaimant in this suit is an intervenor and not an original defendant. As such he is not permitted by Equity Rule 30 to enlarge the field of litigation beyond the scope of the controversy as defined by the original parties.

(b) The affirmative relief sought by the counterclaim is attempted to be asserted against receivers appointed by the District Courts of the United States for the Eastern District of Virginia and the Southern District of Florida, from neither of which has authority to sue been obtained by intervening defendant Pollard. If granted it would directly affect and disturb the possession, management and control of the property

of which appellants are receivers and therefore lies only in the jurisdiction of the courts of their appointment. The statutory court is accordingly without jurisdiction to adjudicate the subject-matter of the counterclaim.

(c) The counterclaim necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act authorizing injunctive relief for a violation of paragraph (18) of that Section. Such a suit must be brought before a single judge and would be appealable only to the Circuit Court of Appeals. It cannot be included in a proceeding properly heard and described only by a statutory court of three judges whose decree may be directly reviewed by this court.

5. If the counterclaim should have been stricken for the reasons stated above, whether appellants have violated Section 1(18) by operating the Fort Benning track without a certificate of public convenience and necessity is not a justiciable question on appeal, and the validity of the Commission's order must be decided without regard for the Section 1(18) aspect of the case. If this issue is to be met on its merits, however, it is manifest that the services performed by appellants between Fort Benning Junction and the military reservation are switching movements and essentially a part of a terminal or plant delivery service and not an extension of operation. As such, under rulings of the courts and of the Commission itself in analogous cases, the operation falls within the purview of paragraph (22) of Section 1 and no certificate of public convenience and necessity therefor is required.

B.

The order of the Interstate Commerce Commission requiring appellants' tariff to be stricken from the Commission's files should have been declared null and void and its enforcement and operation perpetually enjoined.

An orderly discussion of the numerous issues presented for review by this appeal is complicated by the fact that the theory upon which the Commission's order proceeds and the basis upon which the decree of the lower court rests are diverse and, in certain respects, conflicting. The Commission finds the tariff unlawful for the reasons quoted in paragraph 1(a) of the Summary of Argument,* disclaiming as ground for its conclusion its finding that appellants were violating paragraph (18) of Section 1 of the Interstate Commerce Act. The statutory court, on the other hand, disregards the principles upon which the Commission relies and reaches a decision upon wholly different and independent bases, including, curiously enough, the ground which the Commission expressly rejected. It will therefore be helpful in avoiding confusion to address our argument first to the imperfections implicit in the Commission's report and order and then proceed to an analysis and discussion of the majority opinion and the decree of the three-judge court.

1.

Appellants' Tariff violates neither Section 6 of the Interstate Commerce Act nor any other provision of Law.

Section 6 of the Interstate Commerce Act, the text of which will be found in Appendix A, prescribes

Supra, p. 19.

generally the requisite contents of and the procedure for filing and publishing tariffs, prohibits changes in published rates and charges except upon due notice, and forbids transportation by carriers subject to the Act unless tariffs covering such transportation are properly filed. In testing the Commission's order here in issue it should first be observed that all of the requirements of this section relating to the procedure for the filing of tariffs and their contents were fully complied with. Neither the order of the Commission nor any evidence of record suggests defects in this respect, and we may proceed to analyze the ground upon which the Commission's order is articulately based on the assumption that in its technical aspects the tariff is beyond criticism.

For convenience we repeat the passages from the report which purport to set forth the reasons underlying the Commission's conclusion that the tariff is unlawful:

> "A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise.
>
> "Our finding of unlawfulness of the tariff * * * is * * * predicated on the fact that it [appellants] has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier"

Underlying both of these statements are, first, the fact that appellants do not physically operate the

track with their own crews and equipment but, for reasons which will be fully explained, elect to employ Page & Harris for this purpose, and, second the Commission's finding that appellants have no legal right to occupy or operate the track. That this finding is considered vital and not merely collateral or in aid of a conclusion that would have been reached independently, is manifest from the pains the Commission has taken in its report to discount the evidence submitted to it *that full and unconditional rights to operate the track whenever they so desire had been granted appellants.*

The subject is treated in that part of the Commission's report reproduced at page 17 of the printed record. Paragraph 8 of the contract between the appellants and Page & Harris* provides as follows:

> "If, as and when the railway so desires, but subject to approval by the Secretary of War, the railway shall have the right to operate switching service with its own engines and crews over the tracks leased to and maintained by the contractors between Fort Benning Junction, Georgia, and the designated receiving and delivery track at the Fort Benning Military Post, the railway paying to the contractors a fair and reasonable compensation for the use of the contractors' facilities."

This contract was submitted in evidence at the hearing before the Commission (R. 21). Shortly after the Examiner's proposed report was issued the Secretary of War explicitly approved paragraph 8 of the con-

*See page 24 of the record.

tract by the endorsement recited in the final report of the Commission and which will be found at page 25 of the printed record.

With this ratification of the grant it might be fairly assumed that whatever bearing such right to operate the track might have upon the legality of the tariff had been fully satisfied. But when the final report appeared it contained this strange commentary on the endorsement of the Secretary of War:

> "The Seaboard contends that by this endorsement the War Department has given approval to that company to operate the Fort Benning line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly the War Department could take no action on a subject matter which the Congress has placed under our exclusive jurisdiction."

That this construction of the official approval contained in paragraph 8 results from a complete misapprehension of the purpose of the parties and the legal consequences of the document itself is apparent from the plain meaning of the language. "The Endorsement," the Commission says, "was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question." What words could more clearly or appropriately operate as a grant of the controverted right than: "the railway shall have the right to operate," etc., or more unequivocably satisfy the only condition of the grant than the terms in which the requisite ap-

proval was given, viz: "Approved, * * * by the Secretary of War as regards the provisions of paragraph (3) of the foregoing contract * * *."

In the light of this uncontrovertible evidence of a contractual right to operate the Fort Benning track the Commission's conclusion to the contrary, so far as it may be founded upon a construction of the contract, is plainly unwarranted.

The Commission, however, denies the efficacy of the grant to appellants of the right to operate the track not only as a matter of construction but for the further reason that "the War Department could take no action on subject matter which the Congress has placed under our exclusive jurisdiction." Obviously the Commission is referring to its finding that before the plaintiffs may operate the track a certificate under Section 1(18) is required, from which it concludes that without the certificate collateral private transactions entered into in contemplation of the operation of the track by the appellants are a nullity. In this effort to defend an untenable position there is not only confusion of thought but significant evidence that, as will be later discussed, the dominating purpose of the Commission's action in this case was to prevent what it conceived to be a violation of paragraph (18) of Section 1 of the Interstate Commerce Act.

If one purchases an automobile the title is not conditioned upon securing a license to operate, nor impaired by the failure to do so. If here appellants had leased the track from the Government the validity of the granting instrument or its efficacy, as between the parties, in conferring the leasehold interest

would not be affected by the certificate requirement of Section 1(18). The interdictions of that section are directed to the exercise of the right of operation when acquired and do not purport to control private contractual relations. For example, in entertaining an application under Section 1(18) for authority to extend a line of railroad the Commission cannot consider whether the charter of the applicant carrier authorized the proposed operation. In such a situation, this court, in *Charlotte Annapolis Ferry Co. v. U. S.*, 285 U. S. 382, 52 S. Ct. Rep. 440, 76 L. Ed. 808, said

> "Whether the railway company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. *Cleveland, etc. Ry. v. United States*, 275 U. S. 404, 414, 48 S. Ct. 189, 72 L. Ed. 338."

Thus the conclusion is irresistible that appellants have acquired an unassailable contractual right to operate the Fort Benning track. This being the case, there is no basis in fact for the assumption, implicit in the theories upon which the Commission's order is predicated, that appellants cannot reach the point to which the tariff publishes rates. And even though the theory were sound as an abstract doctrine (which, of course, is denied) there is no room for its application in the instant case.

But even if we assume that appellants were effectually barred from entering the reservation and that the Commission was correct in its finding that Fort Benning cannot be reached by them or any other common carrier, the order declaring the tariff to be illegal cannot be sustained under Section 6 of the Interstate Commerce Act or any other provision of law of which appellants are aware. In discussing this question it should be borne in mind that the Commission has disclaimed any reliance upon Section 1(18) as ground for its order, that all implications arising from a possible violation of that section must therefore be discarded, and that the issue is confined to whether a tariff which publishes rates to and from a point not on the publishing carrier's line and which cannot be reached by it or any other common carrier is in conflict with Section 6 of the Act or any other applicable law.

What appellants have done in publishing the tariff is neither unprecedented or unusual. Stripped of technicalities, they have merely provided common carrier transportation service to a large plant located adjacent to their line. This has been common among railroads for years and until now no suggestion of illegality has attached to the practice merely because the point served is not physically located on the tracks, or the actual operation has been conducted by an agent other than a common carrier. Similar arrangements have been before the courts and have been approved. See, for example, *Vicksburg, etc., R. Co.* v. *Anderson-Tully Co.*, 256 U.S. 408, 41 S. Ct. Rep. 524, 65 L. Ed. 1020, where a trunk line carrier whose tracks terminated on the west bank of the Mississippi River published

tariffs to Vicksburg on the east bank, employing another carrier as its agents to perform the ferriage across the river and to make deliveries in Vicksburg. The rates were published as those of the trunk line, the delivery agents being compensated not through divisions but on a contract basis. The court characterized the arrangement as "equivalent to a lease of the road of the (delivering) company to the Vicksburg Company for its transportation purposes." The similarity of the two situations is apparent, and yet, though the theory of the Commission here applied would have likewise condemned the arrangement there under consideration, since Vicksburg was not physically located on the publishing carrier's line, no suggestion of its illegality is to be found in the opinion of the court. *Cf.* also *Cattle Raisers Assn.* v. *C. B. & Q. R. Co.*, 11 I. C. C. 277, 294, where delivery by carriers to off-line stockyards was recognized by the Commission as a legitimate transportation service which might be properly performed through independent agents, and *U. S.* v. *B. & O. R. Co.*, 231 U. S. 274, 34 S. Ct. Rep. 75, 58 L. Ed. 218, where this decision was approved.

The custom of extending transportation service over private tracks is one of such long standing that even though the Commission had not expressed its attitude a presumption of legality would exist. The practice, however, has received the explicit approval of the Commission in numerous cases. In *American Fuel Co.* v. *A. T. & S. F. Ry. Co.*, 123 I. C. C. 101, the Commission said (p. 112):

> "Service over private tracks or plant facility tracks by a common carrier subject to

> our jurisdiction is neither compelled nor prohibited under the Interstate Commerce Act. To furnish it or withhold it is within the discretion of the carrier. * * * Moreover, where, as here, the defendants have elected to perform the service they should publish tariffs to cover it."

To the same effect is *Winnsboro Granite Corp.* v. *Southern Ry. Co.*, 176 I. C. C. 481, 483.

For many years carriers whose rails terminate on water have extended their service by lighterage to reach important markets on the opposite side. Not infrequently the lighterage is performed not by the railroads themselves but through agents employed under contract. In the absence of discrimination or conflict with the other legal proscriptions this service to off-line points has been consistently approved by the Commission. *Federal Sugar Refining Co.* v. *B. & O. R. Co.*, 17 I. C. C. 40; *Lighterage & Storage Regulations at New York*, 35 I. C. C. 47.

Constructive or off-track stations offer a close parallel to the instant case. A constructive station is defined by the Commission as:*

> "an incorporeal point reached by motor truck and placed so as to conveniently conclude the carrier's tariff obligation, *which is made to extend beyond its rail head* * * *."

An inland station differs from a constructive station only in that it is a station in fact where all the ordinary functions of receipt, delivery and other services inci-

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Constructive and Off-Track Stations, 156 I. C. C. 205, 208.

dent to transportation are actually performed. The essential feature of both, as the italicized language above quoted indicates, is their location off the carrier's rails. Both classes of service have been long rendered by railroads, and, though the subject of exhaustive investigations by the Commission, they have never been declared unlawful merely because the points served, and to which the common carrier obligations of the railroad extend, are not located on the carrier's rails and cannot be reached by any other common carrier.* *Constructive and Off-Track Freight Stations*, 156 I. C. C. 205; *Transfer in St. Louis & East St. Louis*, 155 I. C. C. 129.

In recent years carriers are more and more frequently establishing store-door pick-up and delivery service to meet the competition of other forms of transportation. That there is nothing inherently illegal in such service, notwithstanding its extension of the carrier's obligations beyond its own rails, is plain. As the Commission has said:

> "Carriers may establish such service and collect their published charges therefor, provided no undue discrimination is practiced." *Coordination of Motor Transportation*, 182 I. C. C. 263, 367.

And in its most recent decision on this subject, approving with modifications, proposals by a large group of rail carriers to enlarge already established pick-up and delivery service, the legality of the practice was

*The usual method of reaching off-track or constructive stations is through the employment of draymen or truckmen under private contract. *Transfer in St. Louis and East St. Louis*, 155 I. C. C. 129, 131; *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 449.

acknowledged without question, the Commission stating

> "Because of their physical limitations carriers by water and by rail have been held to be under no legal obligation to deliver freight beyond their docks and stations, but in some instances such carriers availed themselves of *their recognized right to so extend their service.*"* *Pick-up and Delivery in Official Territory*, 218 I. C. C. 111, 170.

Other instances involving service to off-line points could be cited, but these examples suffice to demonstrate how radically the theory relied on by the Commission in the present case departs from long established practices, and how completely it repudiates principles recognized and repeatedly approved by the Commission.

If the proper implication to be drawn from the Commission's statement of the ground upon which its order is based is that the tariff is unlawful because the services between the junction and the military reservation are performed by agents and not by appellants themselves, the order is equally untenable. These services, whether in fact a line-haul or a switching movement, are unquestionably public transportation. The Commission itself does not question the common carrier nature of the service if the operation constitutes an extension, and it is equally clear that if, as appellants contend, it constitutes a switching movement it is likewise transportation which appellants are entitled and, under the tariff, are required to provide as a common carrier. In *American Sheet & Tin*

*Emphasis ours.

Plate Co. v. United States, 15 Fed. Supp. 711, a recent decision of the District Court for the Western District of Pennsylvania, the court said (p. 713):

> "However, it is certain that 'spotting service' is 'transportation' * * *, and therefore a common-carrier service up to certain limits, and includes the placement of cars in position accessible to consignors and consignees respectively for loading and unloading. By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right-of-way, and also on private industrial tracks off the carrier's right-of-way on the private property of the industry served.
>
> "We therefore reach the conclusion that 'spotting services' are recognized in law as common-carrier service to which the shippers are entitled and which the carriers are in duty bound to perform."

If, then, appellants proposed to operate over the track with their own crews and equipment they would be legally free, apart from the possible interdiction of Section 1(3), to undertake and perform the service by simply complying with tariff requirements. The Commission's report apparently holds that because they have found it expedient for reasons heretofore explained * to operate the track through an agent who is the lessee of the property and licensed by the owner to operate it, the service legally rendered thereby becomes unlawful when vicariously performed.

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* Supra, p. 7.

For this principle there is no support in law, or, we submit, in reason. On the contrary it is firmly established that a common carrier may hire facilities and employ an agent to perform any service which it might itself undertake. Prior to the passage of the Act to Regulate Commerce this court in the *Express Cases*, 117 U. S. 1, 23, 6 S. Ct. 542, 551, 29 L. Ed. 791, 801, said

> "The railroad company performs its whole duty to the public * * * when it affords * * * all reasonable accommodations. If this is done the railroad company owes no duty to the public *as to the particular agencies it shall select for the purpose*."*

This common law principle has not been modified by the Act. In *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 32 S. Ct. 22, 56 L. Ed. 83, decided after the Act was passed, the court stated:

> "*There is nothing in the Act [to regulate commerce] to prevent a carrier from hiring the instrumentality [of transportation] instead of owning it.*"*

And later, in *U. S. v. B. & O. R. Co.*, 231 U. S. 274, 34 S. Ct. Rep. 75, 58 L. Ed. 218, an agency arrangement for the performance of a transportation service was considered without suggestion of disapproval.

Moreover, the Commission long ago recognized the right of a carrier to employ and compensate an agent for the performance of a part of its transportation services. The legality of such an arrangement was

*Emphasis ours.

an issue in *A. T. & S. F. Ry. Co. v. Kansas City Stock yards Co.*, 331 I. C. C. 92, and was approved in language particularly apt in connection with the question here presented. At page 98 of that report the Commission said:

> "Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured."

The same view has been expressed in *In re Allowances to Elevators by Union Pac. R. Co.*, 12 I. C. C. 47; *Edge Moor Iron Company v. Director General*, 81 I. C. C. 537, and many other cases.

This long accepted principle has been recently affirmed in *American Sheet & Tin Plate Co. et al.* Referring to the operating services which were one subject of the Commission's order enforced in that case the court said (p. 714):

> "It is also certain that the carriers may either do this operating service themselves or engage others, including shippers and owners of property transported, to do it."

It is accordingly so firmly established that a carrier may perform part of its services through an agent that the matter would scarcely have warranted even brief allusion but for the possible implication which could be drawn from that part of the Commission's

report which holds that a carrier has no right to include within the switching districts tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise. If this statement is intended to mean that the service is unlawful because appellants do not *own* the facilities affording entry into the reservation and have therefore found it expedient to operate the track through an agent already licensed to do so, it is manifestly in conflict with the judicial and administrative approval of such arrangements in the past. On the other hand, if it is intended to condemn what appellants have done merely because the agent employed is not a common carrier the position of the Commission cannot be supported in law or in reason, and is diametrically opposed to the views expressed in its decision in *A. T. & S. F. Ry. Co. v. Kansas City Stockyards Co.*, quoted above.

Since then, the order of the Commission cannot soundly rest upon the illegality of the agency arrangement or the status, as private carriers, of Page & Harris, and cannot be sustained merely because the tariff publishes rates to a point not physically located on appellants line, there is no perceptible ground upon which the tariff conflicts with Section 6 of the Act.

2.

The Order lacks the certainty and precision requisite to the validity of an Order of the Commission.

Section 6 of the Act, set forth in Appendix A, prescribes with such particularity the duties of the carriers and the powers of the Commission with respect

to the form and content of tariffs that it may be fairly said that no part of the encyclopaedic code of railroad regulations contained in the Interstate Commerce Act has been drafted with more meticulous regard for detail and less resort to generality. It might therefore have been reasonably expected that in ascribing the illegality of the tariff to a supposed conflict with this section the Commission would have given some indication of the specific requirements of the section to which, in its opinion, the tariff fails to conform. Instead, the only mention of a statutory violation is found in the closing paragraph of the report where it is said in the most general possible terms to violate Section 6.

This section, embracing thirteen paragraphs and many more subparagraphs, deals with a number and variety of subjects. A general reference to it is scarcely more informative of the specific offense with which appellants are charged than would be a statement that they are violating the myriad provisions of the Interstate Commerce Act itself. If the tariff is unlawful it should be withdrawn, but before compelling its cancellation it is the duty of the Commission to apprise appellants of the reason for its opinion in some clearer and more definite form than by general reference to a part of the Interstate Commerce Act so broad in scope as to defy identification of the particular provisions which the Commission deems to have been violated. Such an order utterly fails to conform to the standard laid down by this court in *Beaumont, S. L. & W. Ry. Co.* v. *U. S.*, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221, where it was said:

> "Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 58, 43 S. Ct. 51, 67 L. Ed. 124."

And in its recent decision in *U. S.* v. *Chicago, M. St. P. & P. R. R. Co.*, 294 U. S. 499, 55 S. Ct. Rep. 462, 79 L. Ed. 1023, this court condemned for uncertainty an order of the Commission suspending coal tariffs in the following language:

> "The difficulty is that it [the Commission] has not [stated its findings] with simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-judicial findings of an administrative agency."

The vice of the order here under attack could not be more aptly described.

In this connection appellants throughout the proceeding before the Commission and the lower court repeatedly sought some tangible expression of the precise ground for attacking the tariff. At the very outset of the hearing they requested that the Central's complaint be clarified (R. 92), and on briefs and oral argument they protested the vagueness and ambiguity which pervaded the defendant's presentation and the proposed report of the Examiner. Yet the final report and order are quite as uncertain

and ambiguous and still leave unanswered the inquiry: *What law does the tariff offend and why?* Until this question is answered the order should not receive judicial approval.

3.

The Order is in reality an effort by the Commission to restrain a supposed violation of Section 1(18) of the Interstate Commerce Act, and, tested by its purpose and effect, is beyond the Commission's power.

From the very inception of the proceeding before the Commission appellants have persistently maintained that its underlying purpose was to restrain a supposed violation of paragraph (18) of Section 1 of the Interstate Commerce Act, and accordingly sought relief which the Commission was without power to grant. A motion to dismiss the complaint on this ground was presented to the Commission at the outset (R. 85), the contention was made one of the averments of the bill of complaint below (R. 5), and the point was vigorously pressed in brief and argument before the Commission and the lower court.

The part played by the Central of Georgia in the earlier proceeding before the Commission (Finance Docket 9709) in which it opposed the application of the Fort Benning Railroad for a certificate under Section 1(18) to operate the Fort Benning track as a common carrier* is significant of its attitude and purpose in filing the complaint which resulted in the order here under attack. In that case the necessity of a certificate for the service between the junction

*Appellants were not parties to the proceeding in Finance Docket 9709.

and the military reservation was not questioned and hence, except by implication, not decided. But having persuaded the Commission to deny the application on the assumption that the proposal there under consideration was within the purview of Section 1(18), the Central manifestly believed that it could invoke the aid of the Commission, acting in its administrative capacity, to circumvent any common carrier operation of the Fort Benning track without the Commission's authority.

The record plainly reveals that this was the Central's dominating purpose in initiating the proceeding known as Docket 26483. Paragraph 13 of the Central's complaint (R. 34) specifies four grounds upon which the tariff is charged with illegality. Of the four, two are based upon the alleged violation of Section 1(18). The remaining two, viz.: that the tariff is obscure and fails to state the charges absorbed by appellants, and that, though in terms it covers "reciprocal switching" there are no reciprocal arrangements involved, were so obviously trivial and without substance that they were not even adverted to during the subsequent stages of the proceeding and must be considered to have been abandoned.

Of the five prayers of the complaint (R. 35) two are directly based upon the supposed violation of Section 1(18). The other three, asking for cancellation of the tariff, for an investigation by the Commission and for general relief, assign no specific ground upon which the tariff is believed to violate the law.

Throughout the hearing and on briefs and oral argument the Central consistently stressed the charge

that the tariff and the services rendered under it were in conflict with Section 1(18) and constituted an evasion of the Commission's order denying a certificate to the Fort Benning Railroad (193 I. C. C. 517). Despite the urgent insistence of the plaintiffs at the very outset of the hearing before the Commission that the generalities of the complaint be clarified so that they would be apprised of any ground for relief, other than the claimed violation of Section 1(18), upon which the complainant might rely (R. 92), the record is barren of any other tangible assignment of illegality. From the form of the complaint and the exclusive emphasis placed upon the Section 1(18) feature of the case in the course of the hearing the inference is therefore compelling that the proceeding before the Commission was conceived and prosecuted throughout for the sole purpose of restraining a violation of Section 1(18).

It is likewise plain that the order of the Commission, responsive to the gravamen of the complaint, was predicated upon the supposed illegality of appellants' operation without a certificate and that, though ostensibly the Commission's action is attributed to the illegality of the tariff, in fact its essential purpose was to restrain what the Commission conceived to be a violation of Section 1(18). The finding of such violation is of itself strongly persuasive of the basic motive of the order, for otherwise that finding would be wholly irrelevant. That it was made is therefore compatible only with the conclusion that it was considered an important factor contributing to the result. The bare assertion that the order proceeds on other grounds cannot overcome the evidence of the record

itself, nor preclude the court from testing the order on the basis of the power actually exerted. The duty of the court in these circumstances has been stated in *Southern Pac. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283:

> "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority [possessed by the Commission], yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

Looking, then, to the substance and ignoring the form of the order, it is manifestly an attempt by the Commission to enforce the provisions of Section 1(18). That, as such, it exceeds the Commission's power will be demonstrated in that part of the brief addressed to the ruling of the statutory court affirming the authority of the Commission to declare the tariff unlawful for that reason.*

4.

The tariff having been filed with the Commission in conformity with legal requirements and administrative regulations, the Commission is without power to strike it from its files.

It is to be observed that the order requires only that the tariff be stricken from the Commission's files.

Ante, pp. 45 to 55.

In this there is a defect of form and substance. Section 6 of the Interstate Commerce Act prescribes the requisite contents of and the procedure for filing and publishing tariffs. Admittedly these requirements were fully complied with by appellants with respect to the tariff here involved, and accordingly it became, and unless subverted by the order, has continued to be a lawfully filed tariff. Whatever power the Commission may otherwise possess to require the annulment of a tariff which it deems unlawful, there is nothing in the provisions of Section 6 of the Interstate Commerce Act or elsewhere which permits it by order to strike a tariff, once published with it, from its files, nor which lends to such an order any effectiveness whatsoever in impairing the legality of the service rendered pursuant to the tariff. On the contrary, the Commission is authorized to reject a tariff for one cause and one cause only, namely, that "it does not provide and give lawful notice of its effective date."*. This specific authority strongly implies that it cannot employ the device for any other reason. Its action here is therefore anomalous and abortive.

C.

The statutory court erroneously held that the order can be sustained as a proper means of restraining a violation of Section 1(18).

We have previously noted the diversity between the grounds assigned by the Commission as the basis for its order and the theories upon which it is sustained

*Section 6(9).

by the court below.* Proceeding on the principle that in testing the validity of the order it is not confined to the reasons stated by the Commission (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 26 S. Ct. 330, 50 L. Ed. 585) the first ground advanced by the court is stated as follows (12 Fed. Supp. 941):

> "Apparently the only reason that the Commission did not declare as a basis for its order the fact that the Seaboard was in fact, though not in name, operating a railroad without having first obtained a certificate of public convenience and necessity was because it was misled as to the meaning of Section 1(20), 49 U. S. C. A. Sec. 1(20), of the Interstate Commerce Act. It is true that such section provides: 'Any construction, operation, or abandonment contrary to the provisions of this paragraph * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected, or any party in interest.' It is also true that no party in interest can initiate a proceeding before the Commission to have it in form or substance enjoin the operating of a railroad in violation of Section 1(18) of the Act, 49 U. S. C. A. Section 1(18). *Texas & Pac. R. Co.* v. *Gulf, etc., R. Co.*, 270 U. S. 266, 46 S. Ct. 263, 264, 70 L. Ed. 578; but 'if application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy.' Id. In the instant case the Central had the right to intervene and did so.

Supra, p. 24.

> "It must be borne in mind that there was no urge that the Commission enjoin the violation of Section 1(18), 49 U. S. C. A. Section 1(18), but merely that the tariff be cancelled. Uncancelled, it apparently panoplies the Seaboard against attack in courts for violation of Section 1(18). Surely the Commission must have authority after declining the issuance of a certificate of convenience and necessity to prevent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision. No one contends that the Commission can enjoin the Seaboard from either directly or indirectly violating Section 1(18), any more than it could punish it criminally. But it can hardly be contended that the Commission must unwillingly acquiesce in fortifying a scheme it disapproves."

If we understand correctly the position adopted by the court on this phase of the case it concedes that the Commission cannot by direct administrative action compel appellants to refrain from violating paragraph (18) of Section 1, but maintains that it can effectually accomplish the same result indirectly by nullifying the tariff and thus exposing appellants to the charge of operating without a duly filed tariff in violation of paragraph (7) of Section 6 of the Act.* This conclusion, we submit, is squarely in conflict with paragraphs (18) to (20) of Section 1 of the Act as construed and applied by this court.

In discussing the issue thus presented it will be helpful to examine the basis for the admission by the court that the Commission cannot "enjoin the

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*Appendix A, p. 102.

Seaboard from either directly or indirectly violating Section 1(18)." Prior to the Transportation Act, 1920, railroad common carriers were free to construct new, or abandon existing, lines and to undertake or discontinue operations as they chose. By that Act the policy of carrier regulation, theretofore mainly confined to the prevention of abuses, was broadened to insure adequate transportation service. *Akron, C. & Y. R. Co. v. U. S.*, 261 U. S. 184, 189, 43 S. Ct. 270, 273, 67 L. Ed. 605, 609, (*The New England Divisions Cases*). Among the measures adopted for this purpose were the provisions of paragraphs (18) to (22) of Section 1, whereby carriers were deprived of untrammeled discretion with respect to extensions and abandonments of line or operation, and authority was conferred upon the Commission to determine as a matter of administrative judgment whether, in each instance, proposed extensions or abandonments were compatible with public convenience and necessity. Congress did not stop, however, at the bare prohibition of these acts without the Commission's consent, but proceeded in comprehensive terms to prescribe penalties for violations and more important to the question here involved to provide in paragraph (20) specific procedure, confined solely to injunctive relief in the Courts, to restrain any extension or abandonment contrary to the provisions of the Act.

In *Texas & Pac. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, this court had occasion for the first time to define the nature and extent of the jurisdiction conferred upon the Commission by paragraphs (18) to (22). The G. C. & S. F proposed to construct certain trackage connecting its

main line with an industrial area in Dallas, Texas already served by the Texas & Pacific. Maintaining that the proposed tracks would constitute an extension within the meaning of paragraph (18), the Texas & Pacific filed its bill to enjoin the construction on the ground that no certificate had first been secured from the Commission. The G. C. & S. F. challenged the jurisdiction of the court on grounds next stated, in the following language of the opinion, 275 U. S. 272, 70 L. Ed. 581, 46 S. Ct. 264,

> "It is argued that the new tracks constitute an extension presents an administrative question, that the Commission has power to decide it, because Congress by necessary authority to determine whether an extension is compatible with the public interest has by implication conferred authority to determine also the subordinate question whether a proposed track constitutes an extension; that if the Commission finds the track to be an extension, it may under its general powers make an order requiring the carrier to cease the same from construction and operation as one not within the prescribed certificate in force; and that as the Commission has such primary jurisdiction, its aid must be invoked before a court can grant relief."*

On this contention the Court ruled:

> "To this argument the provisions of the Act afford a conclusive answer. Paragraph (18) prohibits construction of an extension without obtaining the certificate. Paragraphs (19) and (20) provide that a carrier desiring to construct

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*Emphasis ours.

> one may apply for the certificate and prescribe the method of proceeding. Whenever such an application is made, the Commission may pass incidentally upon whether what is called an extension is in fact such; for if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track. *But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If the application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph (20) affords him the only remedy. That remedy is both affirmative and complete.*"*

Again, in *St. Louis S. W. R. Co.* v. *Missouri Pac. R. Co.*, 289 U. S. 76, 53 Sup. Ct. 516, 77 L. Ed. 1042, this court, commenting on Section 1(18), said:—

> "Transportation Act, 1920, which confers upon an interested carrier the right not to be subjected to * * * new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right. The remedy prescribed is a proceeding to enjoin. Paragraph 20 of Section 1 declares that 'any construction or operation' contrary to the provisions of paragraphs 18, 19 or 20 'may be enjoined by any court of competent

*Emphasis ours.

> jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest.' That procedure affords an opportunity 'to secure an orderly hearing and proper determination of the matter.' *Western P. C. R. Co.* v. *Southern P. Co.*, 284 U. S. 47, 52, 76 L. Ed. 160, 163, 52 S. Ct. 56; and the remedy is 'both affirmative and complete' ", *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 273, 70 L. Ed. 578, 582, 46 S. Ct. 263.

The principle of these decisions has been recognized and applied by the Commission itself. In *Hild* v. *Chicago, N. S. & M. R. Co.*, 150 I. C. C. 367, a committee of security holders filed a complaint under Section 13(1) of the Act alleging that the railway company had issued securities without first obtaining the authority required by Section 20a. The Commission was asked to investigate the matter and to decide whether it had jurisdiction over the issue in question. A hearing was held, following which the Commission dismissed the complaint for lack of jurisdiction, relying, as will be noted from the following portion of the report, upon the *Texas & Pacific Case:*

> "While we have already investigated the complaint and have developed a record in the proceeding, we do not feel, for the reasons stated, that we should make any findings of fact, or state any conclusions, or render any decision as to the application of Section 20a to the issue of securities by defendant. *Under the opinion of the court in Texas & Pac. Ry.* v. *Gulf, etc., Ry., 270 U. S. 266, it is doubtful*

*whether we have jurisdiction to entertain the Complaint, notwithstanding the provisions of Section 13.** In that case suit was brought under paragraph (20) of Section 402 of the transportation Act, 1920, against the Gulf, Colorado & Santa Fe Railway Company to enjoin the construction of railway tracks as constituting an extension for which a certificate of public convenience and necessity must first be obtained from us under paragraph (18) of that section, inserted as paragraph (18), Section 1, of the Interstate Commerce Act. By answer defendant in that case challenged the jurisdiction of the court, insisting that the line was a mere industrial track within the exceptions of paragraph (22). In disposing of this contention the court says:

(Here follow the quotations from the decision in the *Texas & Pacific Case* set out above.)

"The same reasoning applies here. *R. R. Com.* v. *Southern Pac. Co.*, 264 U. S. 331, 347. Paragraph (2) of Section 20a makes it unlawful for any carrier within the meaning of that term as used in the section to issue any securities unless and until upon application by the carrier and after investigation by us we authorize such issue by our order. Paragraph (4) provides that applications for authority to issue securities shall be in such form and contain such matters as we may prescribe, and shall be signed, verified, and filed as herein required, paragraph (6) relates to procedure upon such applications, and paragraph (3) confers upon us certain powers with respect to the dispositions of such applications. When an application is made under Section 20a we may pass incidentally upon the question whether the applicant

*Emphasis ours.

> is a carrier within the definition of that term as used in the section. A carrier desiring to issue securities, by making application to us, does not necessarily admit that it is such a carrier. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion our order authorizing the issue of securities as proposed is not required because it is not a carrier subject to the provisions of Section 20a. But a party in interest who is opposed to the issue of securities as proposed is not authorized by the Act to initiate before us any proceeding concerning such issue. If application for an order authorizing an issue of securities is made, and a hearing is had, he may appear there in opposition. If no such application has been made, paragraph (11) affords him the only remedy. That remedy is affirmative and complete.
>
> "For the reasons stated we are of the opinion that we should not entertain the complaint."

By these decisions it is settled beyond possibility of dispute that the sole remedy for a violation of paragraph (18) of Section 1 is the injunctive relief provided by paragraph (20), and that accordingly the Commission is without jurisdiction, in an administrative proceeding before it, to enforce the act or to restrain or punish its violation.

The decision of the court below, as previously stated, concedes the force and conclusive effect of the decisions cited in denying to the Commission, acting in its administrative capacity, the power to restrain an operation deemed to be contrary to the provisions

of Section 1(18). It then proceeds, however, to hold that though the statutory infringement cannot be reached directly, yet if the approach of the Commission is through its tariff regulating powers the supposedly unlawful operation can be prohibited by a cancellation of the applicable tariff as effectively as though the Commission had plenary authority to enforce the Act by administrative order. The court, in other words, affirms in the Commission the right to reach obliquely an objective which it cannot attain directly.

With deference to the views of the lower court, we submit that this employs form to destroy substance. As already observed, paragraphs (18) to (22) of Section 1 added to the Interstate Commerce Act a new subject of regulation, completely self-contained. These paragraphs embraced not only the restrictive provisions but likewise the machinery for compliance and the remedy and punishment for violation. The remedial and enforcement provisions, this court has said, are plenary and exclusive, leaving no room for administrative action by the Commission. The lower court would nevertheless permit the Commission's general power to regulate tariffs to be utilized as an alternative procedure to restrain violations of paragraph (18). This ruling, we submit, is utterly incompatible with the form of relief specifically prescribed by paragraph (20,) and the judicial forum provided for its enforcement.

To this contention, which was vigorously urged upon the statutory court, the opinion replies that unless the Commission can cancel the tariff appellants are immune to attack for a violation of Section 1(18), and that the Commission has the authority "to pre-

vent the continuance of the use of its files and its apparent approval of a scheme to defeat its formal decision."* The court's apprehension is manifestly unfounded. A test of the appellants' operation of the track is available to the Commission or any party in interest, but it must be had in the manner prescribed by paragraph (20). The injunctive remedy there provided affords full opportunity to the Commission to challenge appellants' action and to purge its files of the tariff if the proper court, in a proper form of action, sustains its contention that the operation is unlawful without a certificate.

D.

The statutory court erred in holding that the order of the Commission was a valid exercise of the Commission's power to prevent impairment of appellants' revenue under the Emergency Railroad Transportation Act.

In sustaining the Commission's order the statutory court assigned an additional ground for its validity, stated by the court as follows (R. 333, 334):

> "Another sufficient reason for sustaining the order, and disclosed in the report of the Commission, is that the tariff unduly impairs the line haul revenue. This is authorized under the Emergency Railroad Transportation Act, 48 Stat. 212, Sec. 4 (49 U. S. C. A. Sec. 254): 'The purposes of this Title are (1) to

*While the assertion that Appellants were attempting to defeat the Commission's order in Finance Docket 9709 has no proper place in the subject under discussion it is appropriate to point out that since the operation of the Fort Benning track is not in appellants' view subject to the Commission's jurisdiction under Section 1 18 , their action in filing the tariff was entirely consistent with their legal rights.

> encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act, as amended which will * * *, (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense.
>
> "See *New England Divisions Case*, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605; *Dayton Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 468, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472; *Wallower v. United States* (D. C.), 32 F. (2d) 524, wherein on page 527 in graphic language it is declared that the Commission has power to 'prevent a carrier from cutting its own throat.'"

In thus relying upon the Emergency Railroad Transportation Act (49 U. S. C. A., Secs. 250-268)* the court, in our view, overlooks two vital considerations, the first procedural, the second substantive.

The purposes of the Emergency Railroad Transportation Act are defined in Section 4 and it is unnecessary to enumerate them further than by reference to those parts of that section quoted in the foregoing excerpt from the court's opinion. But the plan and procedure for effectuating these purposes explicitly designated by the Act have an important bearing upon this aspect of the decision.

Section 2 of the Act (U. S. C. A., Title 49, Sec.

*The text of Title I of this act is set forth in Appendix C. The provisions of Title II are inapposite.

252, creates the office of Federal Coordinator of Transportation. Section 2 divides carriers into three groups and provides for each a regional coordinating committee. Section 4 as stated sets forth the purposes of the Act. The following sections direct the regional committees on their own initiative to carry out the designated purposes through voluntary action of the carriers failing which they shall recommend to the Coordinator the action they propose. The areas in them authorized to issue and enforce orders are limited to such orders as be found to be necessary in the public interest and in furtherance of the purposes of the Act. Section 5 provides a review by the Interstate Commerce Commission of any order so issued with appropriate requirements for notice and hearing and authorizes the Commission after such review to modify or order [illegible] to modify the order [illegible] to comply with any order of the Coordinator or the Commission. Sec. 12 and 13 [illegible] may be invoked in the same manner as [illegible] of the Commission made under the Interstate Commerce Act (Sec. 16).

[illegible] this brief synopsis of the Act it will be seen that in order of the Interstate Commerce Commission to exercise the powers delegated to it by the Emergency Railroad Transportation Act [illegible] proceeding which has been instituted by it [illegible] manner provided by the Act itself. The situation in the Commission may be stated thus: An order of the Commission [illegible] a carrier [illegible] a petition pursuant to Section 5 [illegible] the order assailed. Such a petition presupposes some final action taken by a regional committee. The determination of both from which an order of the Co-

ordinator has emerged. In the absence of such an order there is manifestly nothing to be reviewed and accordingly nothing upon which the Commission can act.

In the instant case the preliminary procedure essential to an order of the Commission sustainable under the Emergency Railroad Transportation Act is wholly lacking. There was neither a recommendation by a regional committee nor an order by the Coordinator, and, of course, no petition to the Commission seeking a review under Section 9 of the Act. The order of the Commission here before the court did not profess to be issued in pursuance of the authity delegated by the Act, or as a step in the administrative process there set up. The procedural prerequisites for effective action by the Commission under the Act are therefore wholly lacking.

The decision of a three-judge court sitting in the Northern District of Illinois in *Louisville & N. R. Co.* v. *United States*, 10 Fed. Supp. 185, is recent support for this view. There the Coordinator had ordered the discontinuance of a newly established interchange of through passenger equipment between connecting rail carriers. The lines affected applied to the district court for an injunction to restrain the order without first seeking a review by the Commission under Section 9 of the Act. One of the questions raised was whether the plaintiff might seek equitable relief without having exhausted its remedies before the Commission. The court held that since the administrative process provided by the statue had not been completed the controversy had not reached a justiciable stage, and denied the application. The

decision, it is true, deals with the jurisdiction of a court of equity to entertain a proceeding arising under the Act before its procedural requirements have been met, but, in its insistence upon strict adherence to the administrative prerequisites of the Act, affirms by analogy the principle which, we submit, is conclusive of the point here under discussion. For if the jurisdiction of a court of equity cannot be invoked until the remedial provisions of the Act have been exhausted, *a fortiori* no action of the Commission may be approved as an exercise of an authority derived from the Act until the preliminary steps indispensable to the creation of jurisdiction in the Commission have been taken. It is therefore inconceivable that the statutory court's reliance upon the Act as a basis for sustaining the order here in question can be sustained.

Even though we disregard the jurisdictional aspect, however, the lower court's resort to the Emergency Railroad Transportation Act as a basis for its approval of the Commission's order is in error for a further and equally conclusive reason. Granting, *arguendo*, that the Commission has the power, whether derived from this Act or some other statutory source, to prevent appellants from unduly impairing their revenue, it cannot do so unless it first finds, upon sufficient evidence before it, that what appellants have done in fact unduly impairs their earnings. *Florida* v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291. The report of the Commission is without suggestion of such a finding, and the record is barren of evidence which, had it been made, would support it.

While the failure of the Commission to make a finding of an essential basic fact is in itself a sufficient answer to this aspect of the lower court's ruling a brief review of certain parts of the record will serve to demonstrate the confusion which induced the conclusion reached by the court. In the proceeding before the Commission in Finance Docket 9709, in which the Fort Benning Railroad applied for a certificate to operate the Fort Benning track as a common carrier, the Commission's report recited evidence adduced by the applicant of the annual revenue which would be derived from the proposed operation. The passage referred to states (R. 230):

> "The applicant's [Fort Benning Railroad's] revenues are estimated at $55,000 a year. * * * * This revenue would accrue from divisions of joint through rates, and, therefore, would operate as a reduction, *pro tanto*, of the Central's or the Seaboard's revenue for the line haul."

And further (R. 231):

> "Here the applicant and its sponsors would be the sole beneficiary of such practices, and at the expense of established carriers whose properties are in receivership."

In its opinion in the instant case the lower court included these statements in its findings of fact (R. 337), and upon them necessarily based its conclusion that appellants' tariff impaired their revenue and that the Commission's order could be sustained on that ground. In so doing it ignored or overlooked the fact that the Seaboard and its Receivers were not

[illegible] the Fort Benning track in the [illegible] arrangement [illegible] the terms and conditions surrounding the operation [illegible] because they are material to the question under discussion but because, in showing the [illegible] between appellants and Page & Harris for performing the services [illegible] undertaken by the tariff in issue in this case differ fundamentally from those prevailed in Docket [illegible] 9791 and that accordingly although the general findings of the Commission in that proceeding [illegible] have the findings of the Commission in this case have no probative value in the proceeding and offer no support for the carrier's finding of reasonableness of revenue.

The contract between appellants and Page & Harris was introduced in evidence as [illegible] and sets forth the terms upon which appellants employed Page & Harris as their agents to conduct the service between the junction and the [illegible] station. The agreement provides that Page & Harris will receive $12.50 for each loaded car transported by them unless appellants' gross revenue is less than $25.00 in which event Page & Harris' compensation will be not exceeding 50% of such revenue. The record explains fully that the arrangement was satisfactory to appellants because they could conduct the switching service through the agency of Page & Harris at less expense than by the use of their own crews and equipment, and was therefore in the interest of economy (R. 115). These facts are pertinent not because they are material to the question under discussion but because, in showing the [illegible]

The record shows that the average [illegible] over a ten period [illegible] was $12.50 (R. 14).

before the Commission, they emphasize the confusion underlying the court's finding on this subject, and conclusively confirm the assertion in Judge Sibley's dissenting opinion that:

> "The putting in evidence of the former proceedings in which Page & Harris were denied a certificate of public convenience and necessity (Finance Docket 9709) did not make the findings in that case findings in this one." (R. 339).

The test of the court's ruling, from the evidential standpoint, however, must in the final analysis rest upon whether there is any substantial factual basis to support a finding that the tariff results in undue impairment of appellants' revenue. On this question all that the record shows is that by publishing the tariff appellants have enlarged the service provided for the public to include the switching of cars to and from the military reservation, whereas formerly their undertaking terminated at Fort Benning Junction. *Had they elected to operate between the junction and the reservation with their own crews and equipment the fact that they made no additional charge for the switching movement would not have been evidence of undue impairment of revenue unless it were shown that the revenue received by them for the entire haul was not sufficient to compensate them for the cost of the service, and upon this point the record is utterly silent.* Instead of operating their own crews and equipment they are employing an agency the use of which effects a demonstrated economy. If the operation of the service by appellants themselves is not, without more, evidence that the service rendered under the tariff is not remunerative,

it is obvious that an arrangement which in fact costs them less can not be validly criticised on that score.

Since, therefore, the jurisdictional basis for action by the Commission under the Emergency Railroad Transportation Act is wholly lacking, and there is neither an essential finding by the Commission of undue impairment of appellants' revenue, nor evidence to support such a finding if made, the conclusion is irresistible that the lower court was in error in approving the Commission's order as a proper exercise of its authority under the Emergency Act.

E.

Appellants' motion to strike the counterclaim of intervening defendant Pollard should have been sustained.

We have previously described the counterclaim filed as a part of the answer of intervening defendant Pollard seeking to restrain appellants' operation of the Fort Benning track without first obtaining a certificate from the Commission (R. 64), and the effort of appellants, by motion to strike pursuant to Equity Rule 33, to remove this issue from the case (R. 72). By the decree of the court below the motion was denied, the counterclaim was allowed, and the injunctive relief sought was granted (R. 342). Appellants maintain that the motion to strike should have been granted for the following reasons:

(1) The counterclaim involves issues which are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30.

(2) The counterclaim seeks affirmative relief which, if granted, would directly affect and disturb the possession, management and control of the property of which appellants are receivers, and therefore involves a controversy which is cognizable only by the courts of their appointment. The statutory court is accordingly without jurisdiction to adjudicate the subject matter of the counterclaim.

(3) The counterclaim, which necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act, seeks injunctive relief for a violation of paragraph (18) of that section, which can be had only in a plenary suit brought in a court of competent jurisdiction before a single judge and cannot be heard or decided by the statutory court of three judges whose jurisdiction is limited to a determination of the validity of the order of the Interstate Commerce Commission challenged in the bill of complaint filed in this cause, and cannot be extended to the adjudication of a controversy cognizable only by a single judge.

1.

The counterclaim involves issues which are not germane to those of the bill of complaint and are therefore not the proper subject of a counterclaim under Equity Rule 30.

Equity Rule 30 provides in part as follows:

"The defendant by his answer shall set out in short and simple terms his defense to each claim asserted in the bill * * *.

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit,

> and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and cross claims."

Taken in its literal meaning the language of this rule, particularly the clause "which might be the subject of an independent suit in equity," would apparently permit the setting up of any counterclaim of any kind whatsoever, provided only that the party who asserts it might have brought an independent suit in equity with respect to the subject matter of the counterclaim. This broad construction, however, would entail startling consequences, for it would permit the intermingling in a single suit of issues wholly unrelated, and thus impart confusion and uncertainty to judicial procedure. For example, a bill filed to enjoin an unlawful action might be met with a counterclaim seeking the specific enforcement of a contract, the subject matter of which was wholly foreign to the cause upon which the bill of complaint itself was founded.

Recognizing the logical consequences of this literal interpretation of the rule, the courts have placed sharp limitations upon it. In *Ohio Brass Co.* v. *Hartman Electric Mfg. Co.*, 243 Fed. 629, suit was filed in the District Court for the Northern District of Ohio alleging infringement of a patent by the defendant. The answer set up a counterclaim for damages caused to the business of the defendant by unlawful threats by the plaintiff against the defendant's

customers and by unfair competitive methods and business practices. The plaintiff moved to strike the counterclaim on the ground, among others, that the facts therein contained would state an independent cause of action in equity and not a counterclaim within the meaning of Equity Rule 30. The court sustained the motion stating:

> "This rule was intended to simplify equity pleading, and not to revolutionize equity practice. All agree that it cannot enlarge the jurisdiction of a federal court, or a court of equity. The set-off or counterclaim must manifestly, therefore, be one cognizable in a court of equity; that is, it must be such as could be made the subject of an independent suit in equity. Manifestly, also, the jurisdiction of the federal court cannot be enlarged by this rule. Obviously, it seems to me, the purpose of this rule was to simplify pleading only, and not to create a new equity practice, and thus permit, under the guise of setting up a set-off or counterclaim, the bringing forward of any matter which will make an independent cause of action cognizable in equity."

The opinion then calls attention to conflicting decisions, with the following comment:

> "The minority reasoning construes set-off or counterclaim as synonymous with cause of action cognizable in equity, as these words are used in Equity Rule 26 (201 Fed. v, 118 C. C. A. v). If the framers of this rule had intended this consequence, they could easily have expressed that intention by using the words 'cause of action cognizable in equity,' instead of 'a set-off or counterclaim which is the subject

> of an independent suit in equity.' There is a wide difference between a cause of action cognizable in equity and a set-off or counterclaim which may be the subject of an independent suit in equity. The minority reasoning ignores this distinction. It breaks down all difference between a cause of action cognizable in equity and a set-off or counterclaim."

The decision in this case has been approved in *Dow Pump & Diesel Engine Company* v. *Wilson-Snyder Mfg. Corp.*, 59 Fed. (2d) 828, and *Frankhart* v. *Metal Lamp Corp.*, 32 Fed. (2d) 920.

In *Durabilt Metal Locker Co.* v. *Berger Mfg. Co.*, 21 Fed. (2d) 139, the court had under consideration a suit for a patent infringement in which the defendant joined to his answer a counterclaim charging the infringement by the plaintiff of another and different patent. The court sustained a motion to strike, explaining that Equity Rule 30 did not modify jurisdictional limitations upon the courts nor abrogate the substantive law that the court would have had no jurisdiction of an independent suit filed by the defendant for the infringement of the patent alleged in the counterclaim, and that consequently it could not entertain such a suit in the form of a counterclaim. In this decision the apparently contrary result reached by the Supreme Court in *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306, is explained and distinguished.

While it would serve no purpose to add indefinitely to the citation of the numerous decisions on this subject, we direct to the attention of the court the

following cases, which, adopting what appears to us to be the logical restrictive interpretation of Equity Rule 30, have denied the right of a defendant to set up in a counterclaim matters constituting a cause of action wholly foreign to the subject of the bill of complaint:

Rome Screenco Co. v. Gaffney Mfg. Co., 5 Fed. Supp. 105;
Lower v. K. & I. Box & Lbr. Co., 6 Fed. (2d) 860;
Parker Pen Co. v. Rex Mfg. Co., 11 Fed. (2d) 533.

The last named case again distinguishes the Supreme Court decision in *American Mills Co. v. American Surety Co.*, *supra*, and is particularly helpful in that, appended to the decision, is a note by the court collecting the authorities.

Applying the rule established by these decisions to the instant case, it is plain that the counterclaim asserted by the intervening defendant here is not within the contemplation of Equity Rule 30. We may concede that he might bring an independent bill in equity to enjoin the operation by appellants, but that alone does not permit him to litigate the subject matter by injecting it by counterclaim into a proceeding dealing with a wholly different question. Appellants' bill seeks to enjoin an order of the Interstate Commerce Commission, and the sole issue raised by the bill is whether that order, and the grounds upon which it proceeds, are tenable. In deciding this question it is unnecessary to determine whether the operation between Fort Benning Junction and the mili-

[illegible] conservation is lawful without a certificate of public convenience and necessity under the provisions of paragraph (1)(E) of Section 7. This latter question is the only one framed in issue by the pretrial order and therefore necessarily must not be passed upon by the court in the adjudication of the issues presented by the [illegible] of complaint. Pleadings [illegible] fall within the principles upon which such motions are here [illegible] and what we deem to be the proper interpretation of Rule [illegible]

The motion may be aided by the decision in Cogdell [illegible] v. Mineral Point Metals Co. [illegible] 77 F. 2d [illegible] wherein it was held that a general allegation of a defendant may issue a subpoena against the plaintiff for the attachment of a patent held by the defendant upon which the plaintiff's suit was based. There the petitioner was a New York corporation and on its motion was ordered to file a bond against defendants costs. Section 53 of the Judicial Code, 28 U. S. C. A. Section 118 provides

> In suits brought for the infringement of letters patent the circuit court [illegible] shall have jurisdiction in all in equity [illegible] the district of which the defendant is an inhabitant or in any district in which the infringement [illegible] and have a regular and established place of business.

The plaintiff moved to strike the counterclaim on the ground that it had not been shown that the

plaintiff was an inhabitant of, or had a regular and established place of business in, the Northern District of Ohio, arguing that since for that reason the court would have had no jurisdiction of an original suit filed against it in that district by the defendants, the court had no jurisdiction under Equity Rule 30 to entertain such a suit in the form of a counterclaim. This Court, however, held that section 48 of the Judicial Code was merely a venue statue, that by filing its suit in the District Court for the Northern District of Ohio the plaintiff waived the right which he might have had to object to the venue of the Ohio court in a patent suit originally brought against him by the defendants, and that the Ohio court therefore had jurisdiction to entertain the counterclaim.

The distinction between that case and the one now before the court is obvious. One of the principal objections here urged against the counterclaim is not merely of venue, but, as will be later shown,* goes to the power of the court to adjudicate the cause of action which the counterclaim attempts to set up. This jurisdictional defect, far more serious and profound than the venue requirements of Section 48 of the Judicial Code considered in the *General Electric Company Case*, is not waived by appellants by filing suit in this court. It is substantive rather than procedural and therefore is not subject to modification or enlargement by Equity Rule 30.

Another vital distinction between the *General Electric Company Case* and the instant suit arises from the fact that the party here interposing the

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Ante, pp. 74 to 81.

counterclaim is an intervenor and not the original defendant. The recent decision of this court in *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U. S. 53, 56 S. Ct. 6, 80 L. Ed. 28, demonstrates that the permissible scope of counterclaims is even more narrowly restricted when filed by intervenors than by defendants. A statement of the case and the holding of the court will reveal its significant application to the question here involved.

The suit was brought by the owner of a patent against the user of a printing press which the bill of complaint alleged to infringe a patent held by the plaintiff. The manufacturer of the press used by the defendant was granted leave to intervene, and in his answer set up a counterclaim alleging that the plaintiff was infringing another and different patent owned by the intervenor. The question before the court was whether such a counterclaim could be properly asserted under Equity Rule 30. The intervenor urged that, since it manufactured the article involved in the suit and the defendant was merely the user, the intervenor was the real party in interest, and the counterclaim should therefore be permitted in order to settle in a single suit the entire controversy between the parties primarily interested.

This Court, however, held otherwise. It stated that the intervenor's position in relation to the case differed essentially from what it would have been had the intervenor been named as a defendant against whom a cause of action in the principal suit existed. In such a case, the Court said, the intervenor, as principal defendant, would have had the right to set up the counterclaim against the plaintiff under the

rule announced in the *General Electric Case* and other similar decisions. Here, however, the plaintiff's cause of action was the use by the defendant of a single machine which the plaintiff claimed infringed a patent owned by it, and in the patent which the counterclaim alleged to have been infringed the actual defendant had no interest whatsoever. There was therefore no foundation for the claim that the defendant sued was not, or that the intervenor was, the real defendant in interest, and since the principal defendant was not concerned with the issues between the intervenor and plaintiff which were raised by the counterclaim the intervenor was not entitled to inject into the main suit and to have adjudicated a controversy solely between it and the plaintiff. In answering the intervenor's contention that counterclaims allowed by Equity Rule 30 are not restricted to those required or permitted to be set up by an original defendant in contra distinction to an intervening defendant the court said that while a distinction between the two is not expressly made, the context in which the word "defendant" is used in the rule is inconsistent with the view that it includes in every sense a party permitted to intervene.

The opinion ends with this significant statement:

> "Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.
>
> "Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates

> the suit and is liable to impose upon plaintiff a burden having no relation to the field of litigation opened by his bill. *Lemer v. K. & L. Box & Lumber Co.*, (D. C.) 6 Fed. (2d), 666; *Gregory v. Pike*, (C. C. A. 1st) 67 Fed. 337, 343. In the absence of language definitely requiring it the construction of Rule 30 for which the intervenor contends cannot reasonably be maintained. The counterclaim against the plaintiff was rightly dismissed."

The same reasoning would exclude the counterclaim here.

In citing this decision we do not overlook a possible distinction which may be urged against its application to the precise question here presented. The counterclaim there asserted infringement of a patent neither owned nor used by the defendant and therefore injected into the litigation a controversy in which the defendant could have no interest. Here it may be said that since the counterclaim seeks to enjoin an operation asserted to be in violation of section 1 (b) and the principal defendant the United States might well have sought the injunction asked by the intervenor the defendant here is not a complete stranger to the issue raised by the counterclaim.

The rule announced by the decision, however, is not we submit susceptible of so narrow an interpretation. As already stated the bill of complaint in this suit merely assails the Commission's order. Neither the United States nor the Commission has questioned the legality of appellant's operation under section 1 (b). The issue raised by the original parties is therefore confined to the validity of the order.

and may be decided without reference to the subject matter of the counterclaim. The decision in the *Brandtjen & Kluge Case* plainly discloses the disposition of this court to permit the parties to define the scope of the controversy between them, and to exclude from the field of litigation questions which are extraneous to its settlement. Measured by this test the intervenor's counterclaim in the pending suit should clearly have been stricken.

2.

The counterclaim seeks affirmative relief which, if granted, would directly affect the possession, management and control of the properties of which appellants are receivers. It is therefore cognizable only by the courts of their appointment and cannot be adjudicated by the statutory court.

The right claimed by the Central to enjoin in this court appellants' operation over the Fort Benning track is asserted against receivers appointed by the District Court of the United States for the Eastern District of Virginia and the Southern District of Florida (Bill of Complaint, Section I, R. 1), and authority to sue has not been obtained from either of the receivership courts. Under established principles those courts have an exclusive jurisdiction over appellants and the possession, management and control of the property of the receivership estate which is wholly incompatible with the power of the statutory court to grant the relief sought by the counterclaim.

In the leading case of *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 69, 28 S. Ct. 182, 52 L. Ed. 379,

holders of equipment trust certificates of the railway, which was in the hands of receivers appointed by a federal court, filed a bill in equity in a state court to establish and enforce by sale the lien of their certificates. The Court held that the state court was without power to decree the sale of the property, stating:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it."

Murphy v. *John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327, involved a replevin action brought in a state court by a claimant of property in the hands of a receiver appointed in bankruptcy proceedings in a federal court. This Court denied the right to prosecute the action in the state court for the following reason:

> "Where a court of competent jurisdiction has taken property into its possession, through its officers. the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised though it is not authorized by any statute. The jurisdiction in such cases

the receivership court in the exercise of its primary jurisdiction over the appointment of receivers or direct the lower court in the various steps in the administration of the receivership estate. In this instance the rule of the exclusive jurisdiction of the receivership court was held to run against a court of appellate rather than concurrent or coordinate jurisdiction

In *Viela v. Kansas City Refining Co.*, 9 Fed. (2d) 213, a party claiming title to property in the hands of a federal receiver asked leave of the receivership court to sue in a state court to establish his title, for damages for trespass and for ejectment. On appeal from an order denying his petition it was held that since the property was in possession of the receivership court it was withdrawn from the control of all other courts, and the receivership court, having power to hear and determine all controversies relating to the property in its possession, could properly deny the right to litigate the title and possession of such property in any other forum. This case is cited not merely as cumulative authority for the principle here involved, but because it applies the doctrine to *an effort in a foreign court to oust a receiver of railroad property from possession and operation of a part of the trackage under his management, which in final analysis is what the intervening defendant here seeks to accomplish by his counterclaim.*

It may be said that these cases deal with *possessory* rights of the receiver to the property of the estate, to a threatened disturbance of the *res* in his custody, and are not authority for the extension of the exclusive jurisdiction doctrine to a case which, as here, involves

the operation of a truck not owned by the corporation in receivership. Such a distinction is wholly inadmissible. In *Dickinson v. Willis* 209 Fed. 171 employees of the Rock Island brought suit against the railway in the state court to restrain an alleged violation of their seniority rights. After securing a temporary restraining order a settlement agreement was reached and the case was dismissed. On final hearing the injunction was denied and an appeal was taken by the employees to the state appellate court.

While the appeal was still pending and the suit against the railway was apparently at an end, the dissatisfied employee then filed a petition in the state court against the railway company and the trustees in the settlement of the original litigation, seeking in the state courts the very relief which he had sought to secure by the temporary injunction issued by the federal court pending appeal to the state appellate court, regardless of the final decree in the case which the railway had in fact obtained. An injunction was accordingly issued restraining the violation of the seniority rights. A demurrer to the petition was granted after which the case was dismissed. It was held that the suit in the state court was an attempt to enjoin the federal court in the exercise of its jurisdiction, and that the state court was without jurisdiction to enter any order affecting the property in the custody

in effect one to compel the specific performance of an agreement to permit the original temporary injunction in the state court to remain in effect. The suit was not therefore of the nature which under Section 66 of the Judicial Code might be brought against the receiver without leave of the appointing court, but rather one which involved the possession, use and administration of the property in the receivers' hands and was therefore in the exclusive jurisdiction of the receivership court. After citing numerous cases, the court said:

> "It is true that in most of the foregoing cases questions of property were involved, *but I see no distinction between the possession of property and the management of property so far as the questions here involved are concerned.** If the district court of Linn County, Iowa, has the power to prescribe the class of persons who shall be employed by the receiver, then it has the power to prescribe how many hours a day they shall work, if it were claimed that a contract therefor was made with the railway company; it has power in a proper case to restrain the receiver from employing members of Brotherhoods, or the reverse. It would also have power, upon presentation of a proper contract made with the railway company, *to prescribe by injunction the number of trains that should be run, and the crossings that should be maintained, and the rentals that should be paid and to enforce mostly any other condition affecting the manner in which the receiver shall conduct the business of his office.*"*

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*Emphasis ours.

If a controversy between a railroad receiver and his employees is one so closely related to and so vitally affecting the administration of the receivership estate as to exclude adjudication by any court other than that having custody of the property, so, *a fortiori*, is an attempt to restrain operation of a part of the line, whether it is owned by the receivership estate or operated under lease or trackage rights. If the statutory court can determine the right of appellants to operate the Fort Benning track by the same token it may adjudicate the legality of their operation of a branch, a section or a division of the system. The statutory court's jurisdiction is dependent upon the nature of the right asserted against the receivership property, custodianship or management, and not upon the extent or degree of the threatened encroachment. A slight trespass upon the province of the receivership court is as violative of the rule of comity as is an aggravated one.

We think it clear, therefore, that the counterclaim should be stricken because it presents a controversy the adjudication of which lies solely in the jurisdiction of the receivership courts.

3.

Since the jurisdiction of the statutory court of three judges is limited to a determination of the validity of the order of the Commission challenged by the bill of complaint filed in this cause it cannot be extended to the adjudication of the counterclaim which, seeking injunctive relief under paragraph (20) of Section 1 of the Interstate Commerce Act, is cognizable only by a single judge.

This is a suit brought pursuant to what was originally a part of Section 1 of the Commerce Court

Act of June 18, 1910 (36 Stat. 539, 28 U. S. C. A., Sec. 47a), and the Urgent Deficiencies Act of October 22, 1913, abolishing the Commerce Court and transferring its jurisdiction to district courts. That it is therefore a statutory proceeding before a special court whose jurisdiction is manifestly limited to the controversy for the adjudication of which it was created and assembled is an elementary and self-evident proposition.

The counterclaim, on the other hand, necessarily proceeds under paragraph (20) of Section 1 of the Interstate Commerce Act providing that a violation of paragraph (18) or (19) of Section 1 of that Act may be enjoined by any court of competent jurisdiction. Admittedly such a suit must be brought before a single judge and cannot be heard or decided by the statutory court of three judges before whom the instant case is pending.

To avoid this obvious jurisdictional obstacle to the counterclaim it may be suggested that the three judge court sitting in this cause was the District Court for the Southern District of Georgia in the sense that the single judge who, but for the statutory compulsion to call two additional judges to his assistance, would be presiding in the district court was a member of the three-judge court; and that the single judge so sitting may hear and determine the counterclaim as a part of the main proceeding quite as effectively as though it had been brought as an independent plenary suit before him. One primary error in this position lies in the fact that the three-judge court, created and assembled, as it is, for the single purpose of hearing a particular controversy, must be considered a judicial

in Cleveland, and authorizing the use of a new joint terminal in that city. The Pittsburgh & West Virginia, a connecting carrier, had appeared before the Commission and opposed the granting of the certificate upon the ground that a bill under the Transit Discrimination Act, the purpose of which was twofold, first to enjoin the Wheeling from abandonment of certain and from performing contracts made by it with other lines with such abandonments in view, secondly to set aside and annul the order of the Commission granting the certificate of public convenience and necessity. The decision of the three-judge court is thus stated in the opinion on appeal:

> The P[illegible] moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the district judge called to his assistance two additional judges, pursuant to the Urgent Deficiencies Act, October 22, 1913, chap. 32, 38 Stat. at L., 208, 219, 220. By consent of the parties, the case was then heard as upon final hearing; and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors and the other grounds of attack on the Wheeling's action were not properly before it as a three-judge court. But, since diversity of citizenship existed *and the district judge concurred in the judgment*,* the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its

*Emphasis ours.

decision can there be the decision of a single judge

The court held that the three judge court had no jurisdiction to [illegible] The first that the [illegible] no equitable interest [illegible] no movement here [illegible] ruling upon the application [illegible] said

The purpose that the [illegible] at the Wheeling should be enjoined because it directors held office illegally [illegible] to their trust and [illegible] rights of stockholders [illegible] and hence that the Wheeling [illegible] exercise the authority granted to it by the Commission was not properly [illegible] suit and is not subject to review [illegible] on a direct appeal An application for [illegible] relief may not be included [illegible] Urgent Deficiencies Act to set aside the order of the Interstate Commerce Commission [illegible] Cleveland C C & St L R Co v United States 277 U S 404 414 72 L Ed 939 941 48 S Ct Rep 129 Great Northern R Co v United States 277 U S 172 181 72 L Ed 839 842 48 S Ct Rep 486 It is neither [illegible] upon the judgment as to the merits But if that character may be [illegible] the plenary equity jurisdiction [illegible] cases Such a suit would [illegible] by a single judge and [illegible] case only to the Circuit Court [illegible]

[illegible]

Hence, the Court declared, the three-judge court should have dismissed the bill not on its merits but because of the misjoinder, in a bill brought under the Urgent Deficiencies Act, of an application for relief invoking the plenary equity jurisdiction of the district court cognizable only by a single judge.

The case is clearly parallel to that here before the court. The only difference lies in the fact that there the prayer for equitable relief held to be objectionable was found in the bill of complaint, whereas here it is attempted to be injected into the proceeding through the counterclaim. The decision, however, condemns the joinder because it intermingled with a three-judge court proceeding an issue which could be heard only by a single judge; and the principle upon which it is founded is plainly applicable regardless of the particular pleading in which the misjoinder appears or the party who is responsible for it.

A novel circumstance peculiar to the instant case lends further pertinency to the conclusion reached by the court in the above decision. Following the entry of the decree below appellants were, and still are, of the opinion that that part of the decree adjudicating the counterclaim could not be reviewed by this Court on direct appeal and have so advised the court in a Supplementary Statement as to Jurisdiction. Confronted, however, with the possibility that this Court may hold that a direct appeal of this part of the decree is permissible, they have included in it the matters submitted for review here. If, however, appellants had awaited this Court's decision on the question without taking further action, and this

Court holds that the decree of the lower court on the counterclaim cannot be appealed directly, they would have been barred by lapse of time from a review of this aspect of the case by the Circuit Court of Appeals for the Fifth Circuit (Judicial Code, Sec. 240, sub-Sec. 8(c), (U. S. C. A., Title 28, Sec. 230). To guard against this possible forfeiture they have concurrently appealed to the Circuit Court of Appeals. That appeal is being held in abeyance until the ruling of this Court decides whether its prosecution is necessary.

From this recital of procedural difficulties the uncertainty and delay which have resulted from the refusal of the statutory court to exclude the counterclaim from the litigation are apparent. Equity Rule 30 was intended to simplify equity pleading (*Ohio Brass Co.* v. *Hartman Electric Mfg. Co.*, 243 Fed. 629), and should not be so construed as to permit the confusion of which its interpretation by the lower court in this case is a direct consequence.

Thus, since, as a matter of law, the three-judge court could not permit the inclusion of an application for equitable relief which is within the plenary jurisdiction of a single judge court in a bill of complaint brought before a three-judge court under the Urgent Deficiencies Act, clearly such a court should not entertain a counterclaim which, if brought as an independent action, would lie only before a single judge. For this reason, as well as those advanced in the earlier part of this brief, the motion to strike the counterclaim should have been sustained.

F.

Regardless of whether the counterclaim should have been stricken, the operation of the Fort Benning track is a switching or terminal movement within the purview of paragraph (22) of Section 1, and therefore does not require a certificate of public convenience and necessity from the Commission.

If, as appellants contend, the counterclaim should have been stricken, whether operation of the Fort Benning track without a certificate of public convenience and necessity from the Commission violates Section 1(18) of the Interstate Commerce Act is removed from the case as a material issue, and the validity of the Commission's order must be decided without reference to this question. But since the statutory court held the operation to be an extension of line and assigned the resultant conflict with the statutory proscription of Section 1(18) as one of the grounds for sustaining the validity of the Commission's order, it is appropriate to a comprehensive treatment of all phases of the decision to discuss the question on its merits.

Throughout the proceedings before the Commission and the statutory court appellants have maintained that the services performed between Fort Benning Junction and the military post are switching movements and essentially a part of a terminal delivery service rather than an extension of operation. As such they are not within the purview of Section 1(18) and no certificate of public convenience and necessity is required. *New York Dock Railway*

Pennsylvania R. Co., 62 Fed. (2d), 1010. Certiorari denied, 289 U. S. 750, 53 S. Ct. 694, 77 L. Ed. 1495.

Regarding the physical conditions at Fort Benning Junction, the track in question, some six miles in length, is used exclusively to reach the military post. There are no other sources of traffic along its route, and shipments are received and delivered only at Fort Benning proper (R. 122). Except for its length, which of itself is not controlling, it is essentially similar to many other tracks independently owned or industrial in their nature by which railroads commonly serve large plants adjacent to their main lines.

Section 1(18), has been frequently before the courts for a judicial determination of its scope and effect in a variety of cases where its application has been questioned. The Act speaks in general terms, providing extension of the Act's operation where the Commission, after hearing, finds that the public convenience and necessity permit or require such extension. It might be expected that the Commission would refrain from attempting to define those general terms in specific cases, leaving that task to the courts. In fact, however, the Commission has frequently undertaken to define in specific cases the terms of the statute. The courts have sometimes approved and sometimes disapproved the Commission's action. It is not necessary to trace here the history of the statute and the decisions from which it stems.

We have already referred to [illegible] the Commission's findings in the present case, having the broad purpose of the statute in mind, that an adequate railroad system [illegible] recognized that the

> "conservation of the financial resources of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public * * *" *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277, 46 S. Ct. 263, 70 L. Ed. 578, 584.

Primarily, then, it was intended by Section 1(18) that outlays for construction purposes be subjected to the Commission's scrutiny in order that injudicious and unnecessary expenditures might be avoided.

The cost of securing the right to operate over new lines as well as the expense of their actual construction is also contemplated by the Act. Thus the acquisition of trackage rights involving payment of substantial rental has been held to require a certificate. *Transit Commission v. U. S.*, 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075.

The creation of theretofore non-existent competition between carriers by invading territory already served is another factor to which the courts have attached importance. In the *Texas & Pacific Case, supra*, the court said:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern."

Invasion of competitive territory and diversion of

earnings have been the controlling factor in the following decisions holding Section 1(18) applicable.

Southern Pac R Co v Western Pac R Co 61 Fed (2d) 732,

Missouri Pac R Co v C R I & P Ry Co, 41 Fed (2d) 182, certificate denied 282 U S 866,

El Dorado & W Ry Co v C R I & P Ry Co, 5 Fed (2d) 777

Marion & E R Co v Mo Pac R Co 149 U S 492

On the other hand the mere possibility of reaching competitive territory through a track connection does not constitute the connection an extension within the meaning of Section 1(18), *C C C & St L Ry Co v U S*, 275 U S 401, 48 S Ct Rep 139, 72 L Ed 333. And where a track was built for the sole purpose of permitting two lines to connect and thus restore interchange of traffic which had been interrupted by the appropriation of a former connecting track by a third line it was a spur track not requiring a certificate. *Mo Pac R Co v Union Pac R Co* 60 Fed (2d) 126

The decisions above cited do not involve in all cases physical or traffic characteristics presented here and they are not offered as exact parallels or controlling authorities. But if we examine the Fort Bragg situation in the light of the attitude of the courts toward Section 1(18) disclosed by the adjudicated cases it is clear that we do not find inherent in the services rendered by the Seaboard any of the potential evils which Section 1(18) was designed to eradicate

First, no construction or investment of any kind is necessary or contemplated (R. 112). The physical plant used in effecting the arrangement is available without a dollar of outlay on the part of either appellants or Page & Harris. In virtually all of the decided cases substantial investment in new construction was proposed. This feature is wholly lacking here.

Second, no new territory is to be reached. Prior to the publication of the tariff here in issue appellants or their corporate predecessor served the military post by delivering traffic to Page & Harris at Fort Benning Junction precisely as they do now. The only change resulting from the publication of the tariff is the assumption by appellants of the responsibility for and cost of the switching service between the junction and the military post. The actual physical operations, however, remain the same as they have been ever since Page & Harris replaced the Central of Georgia in October, 1932.

Third, there is present no element of invasion of a preempted territory. Whatever may have been the comparative accessibility of the traffic at Fort Benning to the two trunk lines prior to the commencement of Page & Harris' operations, since that time the military post has been open to both on equal terms, and the competitive situation is and will remain unaffected.*

While no single factor may be said to be decisive in a case of this character, it is plain that none of the considerations to which the courts have given weight

*Doubtless the Central of Georgia has lost some traffic by its refusal to enter into the same agreement with Page & Harris as the Seaboard has. This, however, is of its own choosing. Page & Harris are ready and willing to provide the same service to both lines, and on the same terms (R. 157).

in construing Section 1(18) is present here. Taken as a whole what has been done to improve transportation conditions at Fort Benning cannot be fairly said to fall within the prohibitions of Section 1(18).

This view is fortified, if not conclusively settled, by the attitude of the Commission as expressed in a report issued shortly before the order here under attack was issued. At Fort Bragg, N. C., there is located a large military reservation the transportation facilities of which are physically similar to, if not identical with, those at Fort Benning. Page & Harris, through Cape Fear Railways, likewise operate the track connecting the adjacent trunk lines with the reservation proper. In *Atlantic Coast Line Railroad Company* v. *Cape Fear Railways*, 197 I. C. C. 397, the Coast Line sought a reduction of the divisions theretofore retained by the Cape Fears on traffic delivered to and received from the reservation. In granting the requested relief the Commission relied largely upon its conclusion (p. 408) "that the services rendered by the defendant [Cape Fear] in connection with the traffic under consideration *are in their nature mere switching movements.*"* The characteristics of the operations at the two military posts are so similar as to admit of no logical distinction between them. If, as the Commission has held, the Fort Bragg operation is a switching movement so likewise is that at Fort Benning.

Finally, in *United States* v. *Idaho*, 298 U. S. 105, 56 S. Ct. 690, 80 L. Ed. 677, this court has recently considered and decided the applicability of Section

*Emphasis ours.

point and that received at the two members is evident. The Idaho track was built to serve the Fort Benning track wholly in the aforementioned. Both served only a small local industry. In neither case was regular train service provided. Stations or loading platforms were maintained along either road in both instances cars were usually ordered as they were required. The service between the Idaho mine and that here before the Court is there so close as to be virtually coincident at the junction under discussion.

Apparently it was to something for grounds upon which to attack the contract arrangement that Pollard for the first time connected all the movement between the connection and the industry as a line haul. Prior to that time there is every indication that like the Commission he considered it only a switching operation. Both reports of the Commission in Finance Docket 9709 state that if the Central operated the track to the reservation it would make Fort Benning a common point on the two trunk lines "charging the Seaboard only the cost of the service for switching to and from the junction." Paragraph 14 of the Central's petition for intervention there states "The service on the Fort Benning line is essentially switching service." R. 21. and paragraph 16 repeats the view. R. 21. When pleading his own right to operate the track the service is apparently a switching movement while in opposing performance by others it becomes an extension of operation for which a certificate is required. Such frankness of position may be opportune but it is scarcely persuasive of the soundness of the contention here urged.

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*R. [illegible] 22, 31.

In closing the discussion of this feature of the case we emphatically repeat that since the counterclaim should have been stricken, whether appellants' operation of the Fort Benning track is in conflict with Section 1(18) is a wholly academic question on this appeal. Viewed in the abstract, however, we submit that under the facts of record it is plain that the service between Fort Benning Junction and the military reservation is a switching or terminal delivery movement within the meaning of paragraph (22) of Section 1 as construed by this court for which a certificate from the Commission is not required.

VI.

CONCLUSION.

The ramifications of this case and the peculiar procedural complexities involved present a variety of issues of coordinate materiality and importance which we have endeavored to discuss in an orderly and logical fashion. In concluding the argument it is not inappropriate to suggest a final consideration which lends perspective to the anomaly of the order of the Commission here under attack. Excluding discriminatory results and the creation of destructive competition—tendencies which can play no part in this case because the record contains no evidence touching upon either—a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making and service as it seems best. *U. S.* v. *Chicago M. St. P. & P. R. R. Co., supra; U. S.* v. *Illinois Central R. Co.*, 263 U. S. 515, 44 S. Ct. Rep. 189, 68 L. Ed. 417. The competition of other forms of transportation i

now so serious, notorious and damaging to the rail carriers that the courts cannot fail to take cognizance of it. As this competition grows keener the right to manage their own affairs within the limits of regulatory law and to frame their own policies becomes more and more essential to the railroads, for they must adapt their practices to new conditions, and, by establishing a flexibility of service heretofore unknown, conform to modern requirements and demands. One of the complaints against railroad management most frequently heard from both their friends and enemies is the rigidity of their policies and their failure to make a realistic attempt to meet changed conditions by providing more flexible and convenient service.

Much progress in this direction has already been made, e. g., the establishing of store-door pick-up and delivery and other forms of coordinated service.* We have demonstrated that if the principle upon which the Commission has decided this case [illegible] would virtually confine the service that rail carriers may perform to their own tracks, to stand in the managerial discretion in devising methods of meeting competition is defeated and the independence of action so essential to the solution of present difficult problems is frustrated. These are not considerations of policy alone, but have a very real and direct bearing upon substantive rights. The regulation of carriers by other laws is not static but must be dynamic and interpreted in the light of changing conditions. When the Commission, in a most important and [illegible] progressive decision, as in this case, [illegible] a carrier cannot lawfully go beyond its own rails

* [illegible]

the validity of its action must be appraised not by a fixed and inalterable standard but in the light of contemporary conditions. So measured the order clearly transcends its power.

We therefore submit that for the reasons fully set forth in this brief the order of the Commission is null and void, that the decree of the statutory court should be reversed, and that the cause should be remanded with instructions that the counterclaim of intervening defendant Pollard be stricken and the relief prayed by appellants in their bill of complaint be granted.

Respectfully submitted,

W. R. C. COCKE,
CHAS. T. ABELES,
Counsel for Appellants.

Norfolk, Virginia,
December 1, 1936.

APPENDIX A.

Interstate Commerce Act, Section 6.

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, re-

schedule in force at the time and kept open to public inspection: Provided, That the Commission may in its discretion and for good cause shown allow changes upon less than the notice herein specified or modify the requirement of this section in respect to publishing, posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions. For such purpose the Commission is hereby authorized to make suitable rules and regulations for the classification of schedule of rates, fares, charges and classifications and to prescribe such rules and regulations from time to time amendatory of or changes in any rate, fare, charge or classification without filing complete schedule covering rates, fares, charges or classifications not changed or in or otherwise as may be necessary or appropriate to carry out the purposes of this part and the public interest.

(b) The names of the several carriers which are parties to any joint tariff shall be specified therein and each of the parties thereto other than the one filing the same shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to show in the copies of the tariffs kept open to public inspection that the carriers filing the same have not given their concurrence thereto.

(c) Every common carrier subject to this part shall also file with said Commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this part to which it may be a party

(6) The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared,

and no such embargo shall apply to shipments so consigned.

"9. The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"10. In case of failure to comply on the part of any carrier, penalty or forfeiture to comply with the terms of any regulation adopted and prescribed or any order made by the Commission under the provisions of this section, such carrier shall be liable to a penalty of five hundred dollars for each such offense and twenty-five dollars for each and every day of the continuance of such offense which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"11. If any common carrier subject to the provisions of this section shall make any unjust discrimination in the rates or charges for the transportation of passengers or property or shall make or give any undue preference or advantage to any particular person or locality in any respect whatsoever or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such carrier shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in the penitentiary for a term of not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

"12. Nothing in this section shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State, municipal or other governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, or the issuance of passes or tickets to bona fide employees, agents, surgeons, officials, and attorneys at law of carriers, and members of their families, and ministers of religion, or the relief of persons shipwrecked, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this section shall prohibit any carrier from giving reduced rates to ministers of religion, or charitable, educational, or eleemosynary institutions, or persons traveling for the purpose of organizing or promoting the formation of agricultural fairs and exhibitions, their managers, agents, and attendants, or the issuance of passes or tickets to such persons; nothing in this section shall prohibit any carrier from issuing passes or tickets to its officers, agents, surgeons, physicians, attorneys at law, and their families; nothing in this section shall prohibit the issuance of passes or tickets to any person in the military, naval, or civil service of the United States, or of any State, Territory, District, or municipality, including the militia or National Guard, when such persons are traveling on official business; nothing in this section shall prohibit the issuance of passes or tickets to any person traveling exclusively in the interest of the charitable, educational, or eleemosynary institutions hereinbefore named, or the return of such passes or tickets; nothing in this section shall prohibit the issuance of passes or tickets to any person traveling exclusively in the interest of the agricultural fairs and exhibit

higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

(12) It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form "The Station Agent of the Company at Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage

in the same, in the following particulars in addition to those relating to the jurisdiction given by the Act to regulate railway traffic, as amended June eighteenth nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the docks at which cars or cargoes of passengers or property are to be received by directing the rail carrier to make suitable connection between its line and a track or tracks which are or may be constructed from the dock to the limits of the railroad right of way, or by directing such connection to be made between rail and water carriers individually or in connection with one another by connecting and switching tracks with the lines of the rail carrier or tracks constructed by the owner. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may either in the construction or the operation of such tracks determine what car shall be used or in the other service provided that nothing in the order authorized by the Commission under the provisions of this paragraph shall be subject to the same exceptions as to findings of public convenience and necessity and other matters as is contemplated under section 1 of this part.

(b) To establish through routes and maximum joint rates between and over rail and water lines and to determine the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates or maximum or minimum or maximum and minimum proportional

rate by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rate are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United State to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

APPENDIX B

Interstate Commerce Act, Section 1 Paragraphs (18) to (22)

(18) After ninety days after this paragraph shall take effect no carrier by railroad subject to this part shall undertake the extension of any line of railroad or the construction of a new line of railroad or shall acquire or operate any line of railroad or extension thereof or shall engage in transportation under this part over or by means of any such new or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or such extension or acquisition or operation of such railroad line or extension thereof and no railroad corporation shall begin the construction of any railroad line or extension thereof without having first obtained a certificate that public convenience and necessity require or will require such construction, and any railroad corporation proposing to construct any railroad line or extension thereof shall, before beginning such construction, apply to the Commission for a certificate that public convenience and necessity require or will require such construction, and shall submit with such application such information as the Commission may require. The Commission shall issue or refuse certificates as applied for or may issue them for the partial exercise only of the privilege sought by the application, after due notice and opportunity for hearing as provided in the case of complaints. No certificate shall be required under this paragraph for the construction of a railroad connecting with the railroad of the applicant, and extending into any State contiguous to the State in which such railroad of the applicant is located, for a distance not exceeding ten miles, for the purpose of enabling the applicant to connect its railroad with a railroad already constructed in such contiguous State, nor shall any certificate be required under this paragraph for the construction or operation of a railroad exclusively within a single municipality or its suburbs, or for the extension of any railroad which, on February 28, 1920, was operated by the owner or lessee of such railroad, or for the acquisition or operation of any railroad or extension thereof which, on February 28, 1920, was owned or operated by the applicant or its lessor, or for the temporary extension or operation of a railroad for a period not exceeding one year and not involving the construction of any bridge or terminal facilities, if the Commission shall find that such temporary extension or operation is required by public convenience and necessity, or for the construction, acquisition, or operation of any railroad or extension thereof which the Commission finds will be of an emergency character and necessary in time to meet the immediate demand or need for railroad transportation, and will not unduly impair the ability of the applicant to render adequate service to the public as a railroad corporation, or for the acquisition or operation of any railroad or extension thereof which the Commission finds will be of an emergency character and necessary in time to prevent the cessation or interruption of railroad transportation over the railroad sought to be acquired or operated

[illegible] railroad by the operation thereof, or any part thereof, to be abandoned with the right to be heard in hereinafter provided with respect to the hearing on complaint on the issuance of certificates, and notice hereof shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(19) The Commission shall have power to issue such certificate as prayed for or to refuse to issue it or to issue it for a portion or portions of a line of railroad or extension thereof described in the application or for the partial exercise only of such right or privilege and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After the issuance of such certificate and not before the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon con-

section thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years or both.

(21) The Commission may, after hearing in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, parties to such proceeding, to provide itself with such adequate facilities for performing as a common carrier the car service as that term is used in this part and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds as to such extension that it is reasonably required in the interest of public convenience and necessity or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX C

Emergency Railroad Transportation Act, 1933.

* * * * This Act may be cited as the "Emergency Railroad Transportation Act, 1933."

TITLE I EMERGENCY POWERS

SEC. 1. As used in this title

(a) The term "Commission" means the Interstate Commerce Commission.

(b) The term "Coordinator" means the Federal Coordinator of Transportation hereinafter provided for.

(c) The term "committee" means any one of the regional coordinating committees hereinafter provided for.

(d) The term "carrier" means any common carrier by railroad subject to the provisions of the Interstate Commerce Act, as amended, including any receiver or trustee thereof.

(e) The term "subsidiary" means any company which is directly or indirectly controlled by, or affiliated with, any carrier or carriers. For the purpose of the foregoing definition a company shall be deemed to be affiliated with a carrier if so affiliated within the meaning of paragraph (8) of Section 5 of the Interstate Commerce Act, as amended by this Act.

(f) The term "employee" includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of

rendition of his service) who performs any work defined as that of an employee or subordinate official in accordance with the provisions of the Railway Labor Act.

(g) The term "State commission" means the commission, board, or official, by whatever name designated, exercising power to regulate the rates or service of common carriers by railroad under the laws of any State.

SEC. 2. In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting, from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, there is hereby created the office of Federal Coordinator of Transportation, who shall be appointed by the President, by and with the advice and consent of the Senate, or be designated by the President from the membership of the Commission. If so designated, the Coordinator shall be relieved from other duties as Commissioner during his term of service to such extent as the President may direct; except that the Coordinator shall not sit as a member of the Commission in any proceedings for the review or suspension of any order issued by him as Coordinator. The Coordinator shall have such powers and duties as are hereinafter set forth and prescribed, and may, with the approval of the President, and without regard to the civil service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such assistants and agents, in addition to the assistance provided by the Commission, as may be necessary

to the performance of his duties under this Act. The office of the Coordinator shall be in Washington, District of Columbia, and the Commission shall provide such office space, facilities, and assistance as he may request and it is able to furnish. The Coordinator shall receive such compensation as the President shall fix, except that if designated from the Commission he shall receive no compensation in addition to that which he received as a member of the Commission.

SEC. 3. The Coordinator shall divide the lines of the carriers into three groups, to wit, an eastern group, a southern group, and a western group, and may from time to time make such changes or subdivisions in such groups as he may deem to be necessary or desirable. At the earliest practicable date after the Coordinator shall have initially designated such groups there regional coordinating committees shall be created one for each group, and each committee shall consist of two regular members and two special members. The carriers in each group acting each through its board of directors or its receiver or receivers or trustee or trustees or through an officer or officers designated for the purpose by such board, shall select the regular members of the committee representing that group and shall prescribe the rule under which such committee shall operate, but no railroad system shall have more than one representative on any such committee. In such selection each carrier shall have a vote in proportion to its mileage lying within the group. The two special members of each committee shall be selected in such manner as the Coordinator

may approve, one to represent the steam railroads within the group which had in 1932 railway operating revenues of less than $1,000,000 and the other to represent electric railways within the group not owned by a steam railroad or operated as a part of a general steam railroad system of transportation. Each such special member shall have reasonable notice of all meetings of his committee at which any matter affecting any carrier which he represents is to be considered and may participate in the consideration and disposition of such matter. Members of the committees may be removed from office and vacancies may be filled in like manner.

SEC. 4. The purposes of this title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act as amended which will (a) avoid unnecessary duplication of services and facilities of whatsoever nature and permit the joint use of terminals and trackage incident thereto or requisite to such joint use: *Provided*, That no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the Coordinator, (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense; (2) to promote financial reorganization of the carriers, with due regard to legal rights, so as to reduce fixed charges to the extent required by the public interest and improve carrier credit; and (3) to provide for the immediate study of other means of improving con-

dation surrounding transportation in all its forms and the preparation of plans thereto.

Sec. 5. It shall be the duty of the committees on their own initiative, generally within each group and jointly where more than one group is affected, to carry out the purposes set forth in subdivision (1) of Section 1, so far as such action can be voluntarily accomplished by the carriers. In such instances as the committees are unable, for any reason, legal or otherwise, to carry out such purposes by such voluntary action, they shall recommend to the Coordinator that he give appropriate directions to the carriers or subsidiaries subject to the Interstate Commerce Act, as amended, by order, and the Coordinator is hereby authorized and directed to issue and enforce such orders if he finds them to be consistent with the public interest and in furtherance of the purposes of this title.

Sec. 6. (a) The Coordinator shall confer freely with the committees and give them the benefit of his advice and assistance. At his request, the committees, the carriers, the subsidiaries, and the Commission shall furnish him, or his assistants and agents, such information and reports as he may desire in investigating any matter within the scope of his duties under this title; and the Coordinator, his assistants, and agents, and the Commission, shall at all times have access to all accounts, records, and memoranda of the carriers and subsidiaries. If, in any instance, a committee has not acted with respect to any matter which the Coordinator has brought to its attention and upon which he is of the opinion that it should have acted under the provisions of Section 5, he is hereby auth-

orized and directed to issue and enforce such order giving appropriate directions to the carriers and subsidiaries subject to the Interstate Commerce Act as amended, with respect to such matter as he shall find to be consistent with the public interest.

(b) In so far as may be necessary for the purposes of this title, the Commission and the members and examiners thereof shall have the same power to administer oaths and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents and to take testimony by deposition relating to any matter under investigation as though such matter arose under the Interstate Commerce Act, as amended and supplemented, and any persons subpoenaed or testifying in connection with any matter under investigation under this title shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as are provided in the case of persons subpoenaed or testifying in connection with any matter under investigation under the Interstate Commerce Act, as amended.

SEC. 7. (a) A labor committee for each regional group of carriers may be selected by those railroad labor organizations which, as representatives duly designated and authorized to act in accordance with the requirements of the Railway Labor Act, entered into the agreements of January 31, 1932, and December 21, 1932, with duly authorized representatives of the carriers, determining the wage payments of the employees of the carriers. A similar labor committee for each regional group of carriers may be selected

by such other railroad labor organizations as may be duly designated and authorized to represent employees in accordance with the requirements of the Railway Labor Act. It shall be the duty of the regional coordinating committees and the Coordinator to give reasonable notice to, and to confer with, the appropriate regional labor committee or committees upon the subject matter prior to taking any action or issuing any order which will affect the interest of the employees, and to afford the said labor committee or committees reasonable opportunity to present views upon said contemplated action or order.

(b) The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

(c) The Coordinator is authorized and directed to establish regional boards of adjustment whenever and wherever action taken pursuant to the authority conferred by this title creates conditions that make necessary such boards of adjustment to settle controversies between carriers and employees. Carriers

and their employees shall have equal representation on such boards of adjustment for settlement of such controversies, and said boards shall exercise the functions of boards of adjustment provided for by the Railway Labor Act.

(d) The Commission is authorized and directed to provide means for determining the amount of and to require the carriers to make just compensation for property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

(e) Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of paragraphs (n), (p), and (q) of the Act approved March 3, 1933, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto."

SEC. 5. Any order issued by the Commission pursuant to this title shall be made public in such reasonable manner as he may determine and shall become effective as of such date not less than thirty days from the date of such publication as the Commission shall prescribe in the order and shall remain in effect until it is suspended or set aside by the Commission or until it is terminated by the lawful authority, as hereinafter provided. Any such order may include provision for the transition to the requirements of such just provisions or arrangements

for such just compensation for the use of property or for carrier services as he may deem necessary or desirable and in furtherance of the purposes of this title

SEC. 9 Any interested party, including, among others, any carrier, subsidiary, shipper, or employee, or any group of carriers, shippers, or employees, or any State commission, or the Governor of any State, or the official representative or representatives of any political subdivision thereof, dissatisfied with any order of the Coordinator may, at any time prior to the effective date of the order, file a petition with the Commission asking that such order be reviewed and suspended pending such review, and stating fully the reasons therefor. Such petitions shall be governed by such general rules as the Commission may establish. If the Commission, upon considering such petition and any answer or answers thereto, finds reason to believe that the order may be unjust to the petitioner or inconsistent with the public interest, the Commission is hereby authorized to grant such review and, in its discretion, the Commission may suspend the order if it finds immediate enforcement thereof would result in irreparable damage to the petitioner or work grave injury to the public interest, but if the Commission suspends an order, it shall expedite the hearing and decision on that order as much as possible. Thereupon the Commission shall, after due notice and a public hearing, review the order and take such action in accord with the purposes of this title as it finds to be just and consistent with the public interest, either confirming the order or setting it aside or reissuing it in modified form, and any order

so confirmed or reversed shall thereafter remain in effect until vacated or modified by the Commission.

SEC. 10 (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the anti-trust laws, as designated in Section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such order is necessary, in his opinion to prevent or

remove an obstruction to or a burden upon interstate commerce.

SEC. 11. Nothing in this title shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment of this Act, with regard to the location or maintenance of offices, shops, or roundhouses at any point.

SEC. 12. The willful failure or refusal of any carrier or subsidiary or of any officer or employee of any carrier or subsidiary to comply with the terms of any order of the Coordinator or of the Commission made pursuant to this title shall be a misdemeanor, and upon conviction thereof the carrier, subsidiary, or person offending shall be subject to a fine of not less than $1,000 or more than $20,000 for each offense, and each day during which such carrier, subsidiary, or person shall willfully fail or refuse to comply with the terms of such order shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom the Coordinator or the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this title and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expense of the courts of the United States: *Provided*, That nothing in this title shall be construed to require any employee or officer of any carrier to render labor or service without his consent, or to authorize the issuance of any orders requiring such service, or to

make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or services.

SEC. 13. It shall further be the duty of the Coordinator, and he is hereby authorized and directed, forthwith to investigate and consider means, not provided for in this title, of improving transportation conditions throughout the country, including cost finding in rail transportation and the ability, financial or otherwise, of the carriers to improve their properties, and furnish service and charge rates which will promote the commerce and industry of the country and including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations; and from time to time he shall submit to the Commission such recommendations calling for further legislation to these ends as he may deem necessary or desirable in the public interest. The Commission shall promptly transmit such recommendations, together with its comments thereon, to the President and to the Congress.

SEC. 14. The expenses of the Coordinator except so far as they are borne by the Commission in accordance with the provisions of Section 2, but not including the expenses of the coordinating committees, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the Coordinator, out of a fund obtained from assessments on the carriers, and said fund is hereby appropriated for the payment of such expenses. It shall be the duty of each carrier, within thirty days after June 16, 1934, to pay into this fund, for the second year of the operation of this

title $2 for every mile of road operated by it on December 31, 1933, as reported to the Commission, and it shall be the duty of the Secretary of the Treasury to collect such assessments. Any amount remaining in the fund when this title ceases to have effect shall be returned by the Secretary of the Treasury to the carriers in proportion to their contributions. The carriers and the Pullman company shall be permitted anything in the Interstate Commerce Act, as amended, to the contrary notwithstanding, to provide free transportation and other carrier service to the Coordinator and his assistants and agents and to the employees of the Commission when engaged in the service of the Coordinator.

SEC. 15. The Commission shall not approve a loan to a carrier under the Reconstruction Finance Corporation Act, as amended, if it is of the opinion that such carrier is in need of financial reorganization in the public interest: *Provided, however*, That the term "carrier" as used in this section shall not include a receiver or trustee.

SEC. 16. Any final order made under this title shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under the Interstate Commerce Act, as amended. The provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913 (38 Stat. L. 219), shall be applicable to any proceeding in court brought to suspend or set aside any order of the Coordinator or of the Commission entered pursuant to the provisions of this title.

Sec. 17. This title shall cease to have effect at the end of one year after the effective date, unless extended by a proclamation of the President for one year or any part thereof, but orders of the Coordinator or of the Commission made thereunder shall continue in effect until vacated by the Commission or set aside by other lawful authority, but notwithstanding the provisions of section 10 no such order shall operate to relieve any carrier from the effect of any state law or of any order of a state commission enacted or made after this title ceases to have effect.